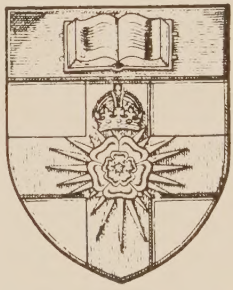
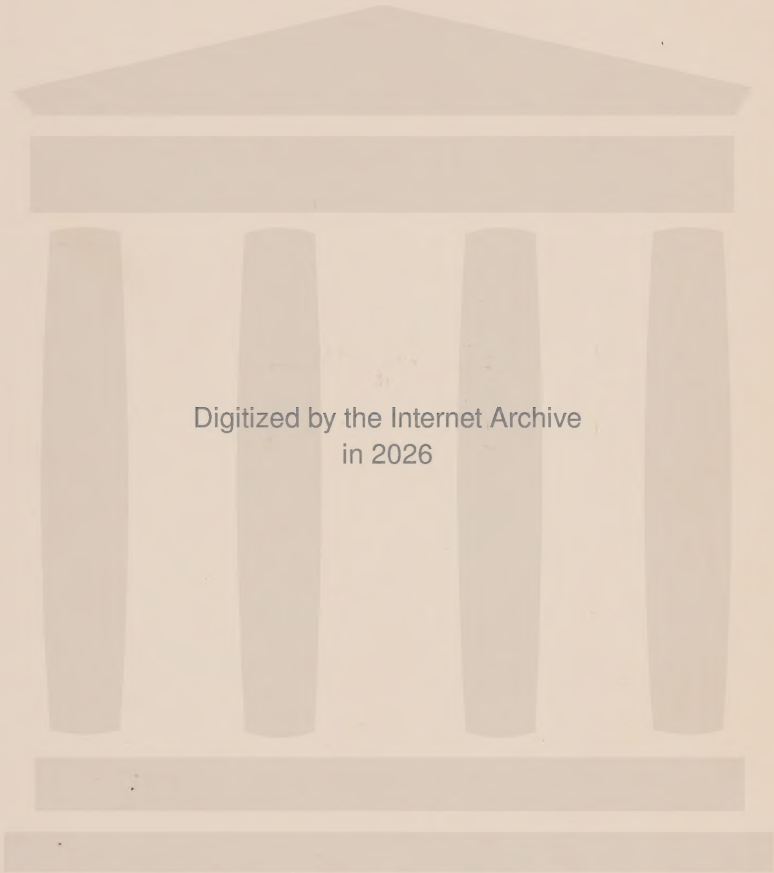
UNIVERSITY OF LONDON LIBRARY

THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

346.4 Mx. North



UNIVERSITY OF LONDON
LIBRARY



Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-exchequer-division_1866-1867_2

Edward Dunn

Love Dunn

1860

COUNCIL OF LAW REPORTING.

Members of the Council.

Chairman—Sir Roundell Palmer, Knt., M.P., Q.C.
Vice-Chairman—W. T. S. Daniel, Esq., Q.C.

EX-OFFICIO MEMBERS.

The Attorney-General, Sir J. B. Karslake, Knt., M.P.
The Solicitor-General, Sir C. J. Selwyn, Knt., M.P.
The Queen's Advocate, Sir Travers Twiss, Knt.

ELECTED MEMBERS.

Mr. Serjeant Hayes Mr. Serjeant Pulling	Serjeants' Inn.
Sir Roundell Palmer, Knt., M.P., Q.C. W. T. S. Daniel, Esq., Q.C.	Lincoln's Inn.
William Forsyth, Esq., Q.C. George Markham Giffard, Esq., Q.C.	Inner Temple.
T. W. Greene, Esq., Q.C. John Gray, Esq., Q.C.	Middle Temple.
James Barstow, Esq. Lewin Taverner, Esq.	Gray's Inn.
William Williams, Esq. (Firm—Messrs. Currie and Williams), Lincoln's Inn Fields W. S. Cookson, Esq. (Firm—Messrs. Clayton, Cookson, and Wainewright), 6, New Square, Lincoln's Inn	Incorporated Law Society.

Secretary—James Thomas Hopwood, Esq., 3, New Square, Lincoln's Inn.

November 4th, 1867.

THE

LAW REPORTS.

Court of Exchequer.

REPORTED BY

JAMES ANSTIE AND ARTHUR CHARLES,

BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. II.

FROM MICHAELMAS TERM, 1866, TO TRINITY TERM, 1867,

BOTH INCLUSIVE.

XXX VICTORIA.

LONDON:

PRINTED FOR THE COUNCIL OF LAW REPORTING

BY WILLIAM CLOWES AND SONS,

DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.

PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

1867.

BIBL. LONDIN UNIV.

JUDGES

OF

THE COURT OF EXCHEQUER,

XXX VICTORIA.

The Right Hon. Sir Fitzroy Kelly, Knt., C.B.
Sir Samuel Martin, Knt.
Sir George William Wilshere Bramwell, Knt.
Sir William Fry Channell, Knt.
Sir Gillery Pigott, Knt.

ATTORNEYS GENERAL:

Sir William Bovill, Knt.
Sir John Burgess Karslake, Knt.

SOLICITORS GENERAL:

Sir John Burgess Karslake, Knt.
Sir Charles Jasper Selwyn, Knt.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Agra and Masterman's Bank, Limited *v.* Leighton 56
Albion Marine Insurance Company, Nixon *v.* 338
Allen, Huffer *v.* 15
Anthony *v.* The Brecon Markets Company 167
Armston, Oldis *v.* 406
Attorney-General *v.* Dakin 290

B.

Barwick *v.* English Joint Stock Bank (Ex. Ch.) 259
Bath, Jessel *v.* 267
Baynes, Bwlch-y-Plwm Lead Mining Company *v.* 324
Blackmore *v.* Yates 225
Bos *v.* Helsham 72
Bracewell, Nuttall *v.* 1
Braun *v.* Weller 183
Brecon Markets Company, Anthony *v.* 167
Buckle *v.* Knoop 125
——————— (Ex. Ch.) 333
Burton *v.* Pinkerton 340
Butler *v.* Knight 109
Bwlch-y-Plwm Lead Mining Company *v.* Baynes 324

C.

Chadwick *v.* Marsden 285

PAGE

Chichester and Midhurst Railway Company, Taylor *v.* (Ex. Ch.) 356
Christie *v.* The Commissioners of Inland Revenue 46
Clay *v.* Oxford 54
Coddington *v.* Paleologo 193
Colchester *v.* Kewney (Ex. Ch.) 253
Coleman, Sowerby *v.* 96
Commissioners of Inland Revenue, Christie *v.* 46
——————— Phillips *v.* 399
Cooper *v.* Woolley 88
Cowan *v.* Milbourn 230
Cragg *v.* Taylor 131

D.

Dakin, Attorney-General *v.* 290
D'Arcy *v.* The Tamar, Kit Hill, and Callington Railway Company 158
Derby, Winterbottom *v.* 316
Dixon, Leconfield *v.* 202

E.

Elliott *v.* The Royal Exchange Assurance Company 237
Emmott, Staffordshire Banking Company, Limited *v.* 208
English Joint Stock Bank, Barwick *v.* 259

F.

PAGE

Falconar *v.* McKenzie 248
Few *v.* Perkins 92
Forster *v.* Mackreth 163
Foulger *v.* Newcomb 327
Franchi, Handley *v.* 34

G.

Goss, Robertson *v.* 396
Great Western Railway Company, Walker *v.* 228
———, Warburton *v.* 30
Green, Isaacs *v.* 352

H.

Handley *v.* Franchi 34
Helsham, Bos *v.* 72
Hoggarth *v.* Taylor 105
Holm, Jones *v.* 335
Holywell Railway Company, Stubbs *v.* 311
Huffer *v.* Allen 15

I.

Isaacs *v.* Green 352

J.

Jacobson *v.* Lamert 394
Jessel *v.* Bath 267
Johnston *v.* Kershaw 82
Jones *v.* Holm 335
——, Wilson *v.* (Ex. Ch.) 139

K.

Kershaw, Johnston *v.* 82
Kewney, Colchester *v.* (Ex. Ch.) 253
Knight, Butler *v.* 109
———, Thompson *v.* 42
Knoop, Buckle *v.* 125
———— (Ex. Ch.) 333

L.

Lafone, Latham *v.* 115
Lamert, Jacobson *v.* 394
Latham *v.* Lafone 115
Leconfield *v.* Dixon 202
Leighton, Agra and Masterman's Bank, Limited *v.* 56
Lewis *v.* M'Kee 37

M.

Maber *v.* Maber 153
Mackreth, Forster *v.* 163
Marsden, Chadwick *v.* 248
McKenzie, Falconar *v.* 285
Mercer *v.* Peterson 304
Milbourn, Cowan *v.* 230
Milner *v.* Rawlings 249
M'Kee, Lewis *v.* 37

N.

Newcomb, Foulger *v.* 327
Nixon *v.* The Albion Marine Insurance Company 338
Noble *v.* Ward (Ex. Ch.) 135
North Eastern Railway Company, Rooth *v.* 173
Nuttall *v.* Bracewell 1

O.

Oldis *v.* Armston 406
Oxford, Clay *v.* 54

P.

Paleologo, Coddington *v.* 193
Perkins, Few *v.* 92
Peterson, Mercer *v.* 304
Phillips *v.* The Commissioners of Inland Revenue 399
Pinkerton, Burton *v.* 340
Pratt, Priestley *v.* 101
Price, Sellin *v.* 189
Priestley *v.* Pratt 101
Priestner, Wood *v.* 66
———————— (Ex. Ch.) 282

R.

Rawlings, Milner *v.* 249
Redway *v.* Sweeting 400
Roberts, Rogers *v.* 35
Robertson *v.* Goss 396
Rogers *v.* Roberts 35

PAGE

Rooth *v.* The North Eastern Railway Company 173
Royal Exchange Assurance Company, Elliott *v.* 237

S.

Sellin *v.* Price 189
Sidmouth Railway and Harbour Company, Williams *v.* 284
Sowerby *v.* Coleman 96
Staffordshire Banking Company, Limited *v.* Emmott 208
Stubbs *v.* The Holywell Railway Company 311
Sweeting, Redway *v.* 400

T.

Tamar, Kit Hill, and Callington Railway Company, D'Arcy *v.* 158
Taylor Cragg *v.* 131
——— Hoggarth *v.* 105
——— *v.* The Chichester and Midhurst Railway Company (Ex. Ch.) 356

PAGE

Tetley *v.* Wanless 21
——————— (Ex. Ch.) 275
Thompson *v.* Knight 42

W.

Walker *v.* The Great Western Railway Company 228
Wanless, Tetley *v.* 21
——————— (Ex. Ch.) 275
Warburton *v.* The Great Western Railway Company 30
Ward, Noble *v.* (Ex. Ch.) 135
Weller, Braun *v.* 183
Williams *v.* The Sidmouth Railway and Harbour Company 284
Wilson *v.* Jones (Ex. Ch.) 139
Winterbottom *v.* Lord Derby 316
Wood *v.* Priestner 66
——————— (Ex. Ch.) 282
Woolley, Cooper *v.* 88

Y.

Yates, Blackmore *v.* 225

TABLE OF CASES CITED.

A.

		PAGE
Abbot *v.* Weekly	1 Lev. 176	98
Abraham *v.* Reynolds	5 H. & N. 143	31
Ackroyd *v.* Smith	10 C. B. 164	5, 6, 7
Agar *v.* Athenæum Life Assurance Society	3 C. B. (N.S.) 725	160
Allen *v.* Keeves	1 East, 435	165
Allnutt *v.* Ashenden	5 M. & G. 392	68, 71, 282
Amos *v.* Smith	1 H. & C. 238	154, 155
Ashby *v.* James	11 M. & W. 542	154
Atkinson *v.* Bayntun	1 Bing. (N.C.) 444	251
Attorney-General *v.* Donaldson	10 M. & W. 117	293
——— *v.* Hill	2 M. & W. 165	254
Austin *v.* Bunyard	34 L. J. (Q.B.) 217	165
——— *v.* Mills	9 Ex. 288	187
Ayre *v.* Craven	2 Ad. & E. 2	329, 331

B.

Baerselman *v.* Langlands	3 H. & C. 433	36
Bagshaw *v.* Eastern Union Railway Company	2 Mac. & G. 389	374
Baker *v.* Tynte	2 E. & E. 897	133, 134
Balden *v.* Pell	5 B. & S. 213	408
Bank of Ireland *v.* Evans' Trustees	5 H. L. C. 389; 4 Irish Com. Law Rep. 624	161
Barclay *v.* Cousins	2 East, 544	150
Barker *v.* St. Quintin	12 M. & W. 441	111
——— *v.* Hodgson	3 M. & S. 267	344
Barry *v.* Midland Railway Company	Ir. Law Rep. 1 C. L. 130	266
Bateman *v.* Mayor, &c., of Ashton-under-Lyne	3 H. & N. 323	384, 385, 386
Batson *v.* M'Lean	2 Chit. R. 51	293
Baxter *v.* Taylor	4 B. & Ad. 72	318
Baylis *v.* Le Gros	4 C. B. (N.S.) 537	94
Beaumont *v.* Greathead	2 C. B. 499	280
Behn *v.* Burness	3 B. & S. 751	195
Belcher *v.* Sikes	6 B. & C. 234	49
Bell *v.* Wardell	Willes, 202	98, 99
Berkeley *v.* Elderkin	1 E. & B. 805	187
Berkley *v.* Watling	7 A. & E. 29	270
Berrisford *v.* Milward	2 Atk. 49	261
Bevins *v.* Hulme	15 M. & W. 88, 96	112
Bills *v.* Smith	34 L. J. (Q.B.) 68	308
Bittleston *v.* Cooke	6 E. & B. 296	308
Blake *v.* Done	7 H. & N. 465	54, 55
Blandy *v.* Herbert	9 B. & C. 396	49
Blewett *v.* Tregonning	3 A. & E. 572	97, 99
Blumberg *v.* Rose	Law Rep. 1 Ex. 232	190
Bodger *v.* Arch	10 Ex. 333	155
Boone *v.* Eyre	1 H. Bl. 273, n.	194

		PAGE
Bostock *v.* North Staffordshire Railway Company	4 E. & B. 813	362, 364
Bottomley *v.* Forbes	5 Bing. (N. C.) 121	130, 131
Boyle *v.* Blackstock	8 L. T. (N.S.) 641	251
Bradley *v.* Dunipace	1 H. & C. 521	270
——— *v.* Eyre	11 M. & W. 432	184
——— *v.* Urquhart	11 M. & W. 432	184
Braun *v.* Weller	Law Rep. 2 Ex. 183	208
Braunstein *v.* Accidental Death Insurance Company	1 B. & S. 782	239, 240
Brooks *v.* Jennings	Law Rep. 1 C. P. 476	23, 354, 355
Broom *v.* Batchelor	1 H. & N. 255	282
Brown *v.* Fullerton	13 M. & W. 556	54
Bruce *v.* Helliwell	5 H. & N. 609	204, 205
——— *v.* Nicolopulo	11 Ex. 129	336
Butcher *v.* Easto	1 Doug. 294	308
——— *v.* Steuart	11 M. & W. 857	251
Buvelot *v.* Mills	Law Rep. 1 Q. B. 104	26, 277

C.

Cann *v.* Cann	3 Sim. 447	75, 76
Carne *v.* Malins	6 Ex. 803	54
Carr *v.* Montefiore	5 B. & S. 408	67
——— *v.* Wallachian and Petroleum Company	Law Rep. 1 C. P. 636	312
Case de Tanistry	Davys, 29	97
Chambers *v.* Manchester and Milford Railway Company	5 B. & S. 588	226, 384
Chandos, Marquis of *v.* Commissioners of Inland Revenue	6 Ex. 479	49
Chesterfield and Midland Silkstone Colliery Company *v.* Hawkins	3 H. & C. 677	353, 355
Chichester *v.* Lethbridge	Willes, 71	319
Chown *v.* Parrott	14 C. B. (N.S.) 74	111
Christie *v.* Commissioners of Inland Revenue	Law Rep. 2 Ex. 46	400
Clapham *v.* Atkinson	4 B. & S. 730	118, 353
Clarke *v.* Imperial Gaslight Company	4 B. & Ad. 315	160
——— *v.* Williams	3 H. & C. 1001	210, 223
Cochrane *v.* Green	9 C. B. (N.S.) 448	60, 65
Cockburn, Ex parte	33 L. J. (Bkr.) 17	353, 355
Coleman *v.* Riches	16 C. B. 104	271
Coles *v.* Turner	Law Rep. 1 C. P. 373	44
Collins *v.* Collins	25 Beav. 306	76, 78, 79, 80, 81
Connelly *v.* Bremner	Law Rep. 1 C. P. 557	184
Cook *v.* Hopewell	11 Ex. 555	24, 278
Corbett *v.* Swinburne	8 A. & E. 673	280
Corner *v.* Sweet	Law Rep. 1 C. P. 456	119
Cornfoot *v.* Fowke	6 M. & W. 358	262
Coulthurst *v.* Sweet	Law Rep. 1 C. P. 649	127, 128, 129, 130
Cox *v.* Midland Counties Railway Company	3 Ex. 268	228, 229
——— *v.* Todd	7 D. & R. 131	195

D.

Darby *v.* Darby	3 Drew. 505	49
Day *v.* Guildford	Sir T. Raym. 19	220
Degg *v.* Midland Railway Company	1 H. & N. 773	31

		PAGE
De Medina *v.* Grove	10 Q. B. 152	17
Denn d. Manifold *v.* Diamond	4 B. & C. 243	49
Deposit Life Assurance Company *v.* Ayscough	6 E. & B. 761	325, 326
Dingwall *v.* Edwards	4 B. & S. 738	26
Doe d. Berkeley *v.* Archbishop of York	6 East, 86	136
—— d. Biddulph *v.* Poole	11 Q. B. 713	136, 138
—— d. Daniell *v.* Woodruffe	10 M. & W. 608	235
—— d. Egremont *v.* Courtenay	11 Q. B. 702	138
—— *v.* Forwood	3 Q. B. 627; 11 Q. B. 723	138
—— d. Morecraft *v.* Meux	4 B. & C. 606	94, 95
Domett *v.* Beckford	5 B. & Ad. 521	38, 40
Duncan *v.* Topham	8 C. B. 225	195

E.

East Anglian Railway Company *v.* Eastern Counties Railway Company	11 C. B. 775	361, 362, 365, 369, 370, 371, 372, 373, 374, 375, 381, 383, 384, 389
Eastern Counties Railway Company *v.* Hawkes	5 H. L. C. 331	357, 362, 364, 367, 368, 369, 371, 372, 382, 385, 388, 392
—— *v.* Marriage	9 H. L. C. 32	29, 123
Elderton's Case	3 Salk. 284; 6 Mod. 73; 2 Ld. Raym. 978	293, 296, 300
Elizabeth, The	2 Dodson, Adm. Rep. 403	344
Ewart *v.* Graham	7 H. L. C. 331	204, 205, 208
Ewbank *v.* Nutting	7 C. B. 797	266

F.

Fessard *v.* Mugnier	18 C. B. (N.S.) 286	25
Fitch *v.* Rawling	2 H. Bl. 393	98
Ford *v.* Beech	11 Q. B. 866	198
Fray *v.* Voules	1 E. & E. 839	111
French *v.* Patton	9 East, 351	136, 138
Furness Railway Company *v.* Commissioners of Inland Revenue	33 L. J. (Ex.) 173	50

G.

Gage *v.* Newmarket Railway Company	18 Q. B. 457	361, 364, 366, 368, 371, 387
Gateward's Case	6 Co. 59 b.	97, 98
Gibson *v.* Sturge	10 Ex. 622	127, 128, 129, 130, 334
Gilding *v.* Eyre	10 C. B. (N.S.) 592	16, 17
Glamorganshire Iron and Coal Company *v.* Irvine	4 F. & F. 947	326, 327
Glennie *v.* Imri	3 Y. & C. 436	59, 60
Goff *v.* Great Northern Railway Company	3 E. & E. 672	266
Goodwin *v.* Cremer	18 Q. B. 757	278, 281
Goss *v.* Lord Nugent	5 B. & Ad. 58	135
Graham *v.* Chapman	12 C. B. 85	308
Grant *v.* Norway	10 C. B. 665	270
Grazebrook, In re	34 L. J. (Bkr.) 17	343
Greasley *v.* Codling	2 Bing. 263	319
Greathead *v.* Morley	3 Man. & G. 139	204, 205, 208

		PAGE
Gregory *v.* West Midland Railway Company	2 H. & C. 944	175, 176
Gresty *v.* Gibson	Law Rep. 1 Ex. 112	354, 355
Gumm *v.* Tyrie	6 B. & S. 298	270
Gurrin *v.* Kopera	3 H. & C. 694	353, 355

H.

Hadow *v.* Parry	3 Taunt. 303	270
Hamilton *v.* Watson	12 Cl. & F. 109	262
Harrington *v.* Binns	3 F. & F. 942	112
Harris *v.* Rickett	4 H. & N. 1	308
Hart *v.* Bassett	Sir T. Jones, 156; 4 Vin. Abr. 519	319, 320, 321
Hartley *v.* Mare	19 C. B. (N.S.) 85	185, 187, 208, 209, 210, 212, 220, 222
Hasleham *v.* Young	5 Q. B. 833	166
Hedley *v.* Bainbridge	3 Q. B. 316	164
Helen, The	Law Rep. 1 Adm. 1	343
Hellings *v.* Jones	10 J. B. Moore, 360	251
Henderson *v.* Royal British Bank	7 E. & B. 356	325
Henniker *v.* Henniker	1 E. & B. 54	49
Henry *v.* Earl	8 M. & W. 228	278, 280
Hern *v.* Nichols	1 Salk. 289	265
Hickmott *v.* Simmons	Law Rep. 2 Eq. 462	277
Hidson *v.* Barclay	3 H. & C. 361	408
Hill, Ex parte	11 Ves. 646; 2 B. & P. (N.R.) 191 n.	186
—— *v.* Cowdery	1 H. N. 360	403
—— *v.* Manchester and Salford Waterworks Company	2 B. & Ad. 544	160
—— *v.* Patton	8 East, 373	136, 138
—— *v.* Tupper	2 H. & C. 121	7, 11
Hilliard, re	2 D. & L. 919	251
Hoad *v.* Grace	7 H. & N. 494	67
Hoare *v.* Rennie	5 H. & N. 19	194, 195
Hobbs *v.* Henning	17 C. B. (N.S.) 791	343
Hobson *v.* Cowley	27 L. J. (Ex.) 205	135
Hodges *v.* Callaghan	2 C. B. (N.S.) 306	17
Hodgman *v.* West Midland Railway Company	5 B. & S. 173	175
Hoggarth *v.* Taylor	Law Rep. 2 Ex. 105	396, 397, 398
Horton *v.* Sayer	4 H. & N. 643	238, 241, 243
Hubbersty *v.* Ward	8 Ex. 330	271
Hubert *v.* Groves	1 Esp. 148	319
Hunt *v.* Bell	1 Bing. 1	330
Hutton *v.* Cruttwell	1 E. & B. 15	307, 308
Huzzey *v.* Field	2 C. M. & R. 432	266

I.

Ingelbach *v.* Nichols	14 C. B. (N. S.) 85	407
Ireland *v.* Livingston	Law Rep. 2 Q. B. 99	85, 86
Iveson *v.* Moore	1 Ld. Raym. 486	319, 320, 321, 322

J.

Johnson *v.* Barratt	Law Rep. 1 Ex. 65	25, 408
Jones *v.* Broadhurst	9 C. B. 173	60, 61

K.

		PAGE
Kelly *v.* Partington	5 B. & Ad. 645	329
Kemp and Another *v.* Balls	10 Ex. 607	278
Kennaway *v.* Treleavan	5 M. & W. 498	67
Keppel *v.* Bailey	2 My. & K. 517	6
Keyes *v.* Elkins	5 B. & S. 240	44, 45, 408
Kirchner *v.* Venus	12 Moo. P. C. 361	128, 129, 130
Knowles *v.* Horsfall	5 B. & A. 134	102, 103, 104

L.

Laird *v.* Birkenhead Railway Company	Joh. 500	161
Laugher *v.* Pointer	5 B. & C. 547	265
Lavery *v.* Turley	30 L. J. (Ex.) 49	135
Lay *v.* Mottram	19 C. B. (N. S.) 479	354
La Banca Nazionale *v.* Hamburger	2 H. & C. 330	54, 55
Lee *v.* Hemingway	15 Q. B. 305 (note)	77
—— *v.* Jones	17 C. B. (N. S.) 482	262, 263
Leeds *v.* Burrows	12 East, 1	77
Leigh *v.* Pendlebury	15 C. B. (N. S.) 815	44
Leslie *v.* Thomson	9 Hare, 273	76
Lewis *v.* Piercy	1 H. Bl. 29	187
Lindon *v.* Sharp	6 M. & G. 895	307
Liverpool Borough Bank, In re the	26 Beav. 268	325
Lloyd *v.* Harrison	Law Rep. 1 Q. B. 502	224
Lloyd *v.* Waterford and Limerick Railway Company	15 Ir. Com. Law Rep. 37	176
Lowe *v.* London and North Western Railway Company	18 Q. B. 632	161
Lucena *v.* Craufurd	2 B. & P. (N. R.) 301	150
Luckie *v.* Bushby	13 C. B. 864	240

M.

McAndrew *v.* Chapple	Law Rep. 1 C. P. 643	337
Macbeath *v.* Ellis	4 Bing. 578	111
M'Creight *v.* Stevens	1 H. & C. 454	325
Macgregor *v.* Dover and Deal Railway Company	18 Q. B. 618; 9 Ex. 73	362 372, 373, 374, 375, 379, 382, 383—9
M'Laren *v.* Baxter	Law Rep. 2 C. P. 559	354, 355, 356
McManus *v.* Lancashire and Yorkshire Railway Company	4 H. & N. 327	175, 176
McSwiney *v.* Royal Exchange Assurance Company	14 Q. B. 634	142, 146, 151
Marks *v.* Hall	Law Rep. 2 Q. B. 31	35, 63
Marshall *v.* Lynn	6 M. & W. 109, at p. 117	135, 138
Mason *v.* Hervey	8 Ex. 819	241
—— *v.* Hill	5 B. & Ad. 1	7
Massy *v.* Nanney	3 Bing. N. C. 478	49
Master *v.* Miller	4 T. R. 320	136
Maunsell *v.* Midland Great Western of Ireland Railway Company	1 H. & M. 160	380
Mellish *v.* Richardson	1 Cl. & Fin. 224	279
Mendel, Ex parte	33 L. J. (Bk.) 14	396
Meyer *v.* Dresser	16 C. B. (N.S.) 646	271
Meynell *v.* Saltmarsh	1 Keb. 847	319
Miner *v.* Gilmour	12 Moo. P. C. 156	7, 9, 13

		PAGE
Mocatta *v.* Murgatroyd	1 P. Wms. 393	261
Moggridge *v.* Jones	14 East, 486	61
Moore *v.* Campbell	10 Ex. 323	135, 136, 138
Morgan *v.* Vale of Neath Railway Company	Law Rep. 1 Q. B. 149	32, 33
Morris *v.* Langdale	2 B. & P. 284	330
Moultby *v.* Richardson	2 Burr. 1032	34
Mounsey *v.* Ismay	1 H. & C. 729	98, 99
Murphey *v.* Caralli	3 H. & C. 462	32
Myers *v.* Perigal	11 C. B. 90; 2 De G. M. & G. 599	145

N.

Newborough, Lord *v.* Schröder	7 C. B. 342	390
Newham *v.* May	10 Price, 117	76
Nicholson *v.* Paget	1 Car. & M. 52	67, 70, 71
Norwich, Mayor of *v.* Norfolk Railway Company	4 E. & B. 412	362, 364 366, 371, 383

O.

O'Brien *v.* Brodie	Law Rep. 1 Ex. 302	251
Okill *v.* Whittaker	2 Phill. 338	75
Overend, Gurney, & Co., In re	Law Rep. 3 Eq. 576	325

P.

Paine *v.* Partrich	Carth. 191	320
Pardington *v.* South Wales Railway Company	1 H. & N. 392	177
Paterson *v.* Harris	1 B. & S. 336	142
Pearce *v.* Brooks	Law Rep. 1 Ex. 213	233
Pearson *v.* Pearson	Law Rep. 1 Ex. 308	123
Pedder *v.* Mayor of Preston	12 C. B. (N.S.) 535	171
Peek *v.* North Staffordshire Railway Company	10 H. L. Cas. 473	175
Pembroke *v.* Colls	10 Q. B. 461	329
Penton, In re	Law Rep. 1 Ch. App. 158	396, 397, 398
Planché *v.* Colburn	8 Bing. 14	313
Pole *v.* Pole	2 Dr. & Sm. 420 11 Jur. NS 477	387
Potter *v.* Commissioners of Inland Revenue	10 Ex. 147	49
Poucher, Ex parte	1 Gl. & J. 385	186
Preston *v.* Liverpool, &c., Railway Company	5 H. L. C. 605	361, 364, 365 366, 367, 368, 373, 387
Prestwich *v.* Poley	18 C. B. (N.S.) 806	111
Prismall *v.* Lovegrove	6 L. T. (N.S.) 329	102, 103
Pyer *v.* Carter	1 H. & N. 916	289

R.

Race *v.* Ward	4 E. & B. 702	97
Raphael *v.* Goodman	8 A. & E. 565	266
Reeves *v.* Watts	Law Rep. 1 Q. B. 412	121, 354
Rex or Regina:		
—— *v.* Churchward	Law Rep. 1 Q. B. 183	403
—— *v.* Company of Fishermen of Faversham	8 T. R. 352	177

		PAGE
Rex or Regina:		
—— *v.* Ponsonby	3 Q. B. 14	293, 296, 302
—— *v.* Stobbs	3 T. R. 735	293
—— *v.* Waddington	1 B. & C. 26, 28	233
Richardson *v.* The Marine Insurance Company	6 Mass. Rep. 102	343
Ricket *v.* Metropolitan Railway Company	5 B. & S. 156	319, 320, 321, 322
Roberts *v.* Great Western Railway Company	4 C. B. (N.S.) 506	177, 180
Robertson *v.* French	4 East, 430	270
Robinson *v.* Wray	Law Rep. 1 C. P. 490	204
Roe *v.* Birkenhead Railway Company	7 Ex. 36	266
—— ex d. Goatly *v.* Payne	2 Camp. 520	94, 95
Roper *v.* Lendon	1 E. & E. 825	239, 241, 243, 245
Rose *v.* Groves	5 M. & G. 613	319
—— *v.* Miles	4 M. & S. 101	319, 320
Royal British Bank *v.* Turquand	5 E. & B. 248; 6 E. & B. 327	160

S.

Sadler *v.* Henlock	4 E. & B. 570	31
Salisbury, Bishop of *v.* Williams	2 Moo. P. C. (N.S.) 375	234
Sampson *v.* Hoddinott	1 C. B. (N. S.) 590	5
Saunders *v.* Best	17 C. B. (N.S.) 731	107
Savory *v.* Chapman	11 A. & E. 829	111
Scott *v.* Avery	5 H. L. C. 811	238, 241, 243, 245, 247
——— Berry	3 H. & C. 966	190
Scottish North Eastern Railway Company *v.* Stewart	3 Macq. 382	390
Selby *v.* Robinson	2 T. R. 758	97, 98
Sharland *v.* Spence	Law Rep. 2 C. P. 456	397, 398
Shephard *v.* De Bernales	13 East, 565	38, 40
Ship's Case	2 De G. J. & S. 544	327
Shrewsbury, Earl of *v.* North Staffordshire Railway Company	Law Rep. 1 Eq. 593	361, 364, 368, 374, 377, 388
Shrewsbury and Birmingham Railway Company *v.* North Western Railway Company	6 H. L. C. 113	384
Simonds *v.* Great Western Railway Company	18 C. B. 805	176
Simpson *v.* Lord Howden	9 Cl. & F. 61; 10 A. & E. 793	361, 376
Smurthwaite *v.* Wilkins	11 C. B. (N.S.) 842	38
South Wales Railway Company *v.* Redmond	10 C. B. (N.S.) 675	384, 386
South Yorkshire and River Dun Company *v.* Great Northern Railway Company	9 Ex. 55	226
South Yorkshire Railway Company *v.* Great Northern Railway Company	9 Ex. 55	362, 364, 366, 370, 374, 383
Spotswood *v.* Barrow	5 Ex. 110	235
Staffordshire Banking Company *v.* Emmott	Law Rep. 2 Ex. 208	183, 185
Startup *v.* Macdonald	6 Man. & G. 593	197
Stead *v.* Dawber	10 Ad. & E. 57	135, 138
Stockport Waterworks Company *v.* Potter	3 H. & C. 300	4, 5, 6, 7, 10, 11, 12, 13, 14
Stone *v.* Jellico	3 H. & C. 263	118
Strathmore *v.* Laing	2 Wil. & Shaw, 1	293, 295, 302

		PAGE
Sutcliffe *v.* Booth	32 L. J. (Q.B.) 136	14
Swan *v.* North British Australasian Company	2 H. C. 175, 182	262

T.

Tanistry, case of	Davys, 29	97
Taylor *v.* Forbes	11 East, 315	34
—— *v.* Hilary	1 C. M. & R. 741	136
Terry, In re	7 L. T. (N.S.) 370	102, 103
Thackthwaite *v.* Cock	3 Taunt. 487, 491	102, 103, 104
Thame *v.* Boast	12 Q. B. 808	24
Thomas *v.* Powell	2 Cox Ch. Cas. 394	75, 76
Thompson *v.* Dominy	14 M. & W. 403	31
—— Knight	Law Rep. 2 Ex. 42	408
Tipping *v.* Johnson	2 B. & P. 357	111
Todd *v.* Maxfield	6 B. & C. 105	185
Tredwen *v.* Holman	1 H. & C. 72	241
Tresidder, In re	Law Rep. 1 Ch. App. 21	217
Tyler *v.* Campbell	3 Bing. N. C. 675	34
Tyson *v.* Smith	9 A. & E. 406	98, 99

U

Udell *v.* Atherton	7 H. & N. 172	262, 265

V.

Van Sandau *v.* Corsbie	3 B. & A. 13	281
Venezuela Railway Company *v.* Kisch	Law Rep. 2 H. L. 99	325

W.

Waite *v.* North Eastern Railway Company	E. B. & E. 728	180
Warwick *v.* Richardson	10 M. & W. 284	390
Watson *v.* Peache	1 Bing. N. C. 327	102
Weeks *v.* Maillardet	14 East, 568	190
Whaley *v.* Laing	3 H. & N. 675,	4, 7
Whitmore *v.* Wakerley	3 H. & C. 538	185, 187, 208, 209, 210, 212, 220, 222
Wicket *v.* Creamer	1 Salk. 264	220
Wiggins *v.* Boddington	3 C. & P. 544	319
Wilde *v.* Gibson	1 H. L. C. 605	262
Wilkinson *v.* Gaston	9 Q. B. 137	195
Willett *v.* Pringle	2 B. & P. (N.R.) 190	186
Winter *v.* Miles	10 East, 578	293, 294, 295, 296, 297, 300
Withers *v.* Reynolds	2 B. & Ad. 882	313
Wood *v.* De Mattos	Law Rep. 1 Ex. 91	106, 108, 109, 396, 398, 408
—— *v.* Veal	5 B. & A. 454	318
Woods *v.* Foote	1 H. & C. 841	407

Y.

Yates *v.* Dalton	28 L. J. (Ex.) 69	166

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXX VICTORIA.

NUTTALL *v.* BRACEWELL.

1866
Nov. 2.

Easement—Watercourse—Riparian Owner—Grant—Division of Stream.

The plaintiff was the lessee of a mill situated on riparian land. A., through whom he derived title, had, in 1804, under a written agreement with the adjoining higher riparian owner, and subject to an annual payment, constructed a goit on the higher owner's land, intercepting the water of the stream at a weir in that land, and bringing it thence to his mill. The flow of the water through this goit had ever since been enjoyed by the mill-owner, and used for the purpose of working the mill; and the annual acknowledgment had been paid. The defendant, a riparian owner above the weir, and also a mill-owner, intercepted the water of the stream for the purposes of his mill; and the plaintiff sued for damages:—

Held, that he was entitled to recover.

Held (per Pollock, C.B., and Channell, B.), that what was done amounted to a division of the stream into two courses; and that the plaintiff was a riparian proprietor in respect of the goit.

Held (per Bramwell, B.), that a riparian land-owner can grant to a non-riparian land-owner the flow of water from the stream to his premises, for the use of the

2 Ch 480
6 Ch 574
Sm 109 HL
115
9 Ch 453.
10 Jur 61
7 HL 700
23 Ch D 507
571
11 QBD. 162-5-6-7-8/170

1866

NUTTALL v. BRACEWELL.

premises; and that the grantee may sue for a disturbance of his enjoyment by a higher riparian owner.

Stockport Waterworks Company v. *Potter* (3 H. & C. 300) considered.

10 Jun HS. 1865.

THE plaintiff's mill was situated on riparian land, and was supplied with water by a goit leaving the stream at a point in the land of a higher riparian owner; the plaintiff brought this action for the diversion of water by a riparian owner above that point.

Declaration, that the plaintiff was possessed of a mill, lands, and premises, and also of a goit or cut running from a stream called the Corn Mill Beck to his mill, &c., and was by reason thereof entitled to the flow of part of the waters of the said stream from the stream along the goit or cut to the mill, &c., for the working and use of the mill, &c., and that the defendant wrongfully diverted from the stream, water which otherwise would and ought to have flowed from the stream through the goit to the mill, &c., by reason whereof the plaintiff was unable to work and use his mill, lands, and premises, so beneficially as he otherwise would have done.

Pleas. 1. Not guilty. 2. That the plaintiff was not entitled to such flow of water as in the declaration alleged. 3. That the plaintiff was not possessed of the mill, lands, premises, goit or cut, in the declaration mentioned. Issue thereon.

The facts appearing on the trial were these:—In 1804, William Bracewell, a relative of the defendant, was the owner of a mill called Coates Mill, situated at a little distance from a stream called the Corn Mill Beck, and also of the land thence up to the bank of the stream. The land on the stream above the mill was owned by one Bagshaw, and was called Tom Milner's Ing, and in this close there was a weir upon the stream at a place called Heble Bridge. In 1804, a written agreement was made between Bagshaw and Bracewell, by which the latter was permitted to cut a goit from the weir in Tom Milner's Ing, through the Ing into Bracewell's land, and for this and another water privilege he was to pay Bagshaw 5*s.* annually. (1) This goit was made accordingly, and had since then,

(1) This agreement was as follows: "Memorandum of an agreement entered into and made, the 14th day of March, in the year of our Lord 1804, between William Chambers Bagshaw, Esq., M.D., of Oakes, in the county of Derby, on the one part, and William Bracewell, of Coates, in the county of York, on the other part. The said W. C. Bagshaw doth agree for him and his heirs to allow the said William Bracewell to cut into a certain meadow called

1866

NUTTALL v. BRACEWELL.

and up to March, 1865, been used for the purpose of bringing the water of the stream from the weir to the mill for the use of the mill, and the acknowledgment of 5s. had during that time been paid. Till about thirty years ago, the mill was worked by water power only, and since then by steam power also.

William Bracewell, by his will made in 1819, devised the premises to his son William and his heirs; but his son having died, the testator, by a codicil made in 1830, devised to a trustee all that he had by his will given to William, in trust for the son's children (three sons and one daughter) in certain proportions. Some time after the testator's death, the three grandsons—William, Thomas, and Christopher—commenced to carry on business at the mill, which had since the testator's death been worked by a firm of Grimshaw and Bracewell. In 1855, they mortgaged their shares to (amongst others) their sister, Sarah Bracewell; and in May, 1857, they executed a deed for the benefit of their creditors, by which they conveyed to the defendant in this action, and to two others, all the messuages, lands, and hereditaments to which they were entitled, upon trust to sell for the benefit of creditors. In September, 1857, the trustees of the deed, with the concurrence of the three grandsons, conveyed the equity of redemption in these premises to Sarah Bracewell, the premises being described, both in the mortgage deeds and in this conveyance, as "all that mill or factory situate, standing, and being on the said Coates estate, with

---

Bank Meadow, and to build a goit therein for the space of 140 yards, beginning from the north side of W. Bracewell's field called Water Ing, and to finish at the rivulet on the west side of Bank Meadow; and the said W. Bracewell doth covenant to make good the land with the said W. C. Bagshaw. And the said W. C. Bagshaw doth further agree to allow the said W. Bracewell to make another goit, through a certain meadow called Tom Milner's Ing, beginning at the west end of the same, at a place called Heble Bridge, and to extend to the north side of the said Tom Milner's Ing, entering the land of W. Bracewell called Sandy Bank; this goit to be 50 yards in length; the land to be made good at the expense of the said W. Bracewell. The said W. Bracewell doth further covenant to pay for the said privilege and privileges the annual sum of 5s. of lawful money to the said W. Bagshaw, his heirs, executors, and administrators. As witness the hands of the said parties, the day and year above-mentioned. — W. C. Bagshaw, W. Bracewell."

It was not shewn at the trial to what goit the first part of the agreement referred, but it was agreed that the one mentioned in the latter part of the document was the goit in question.

1866
NUTTALL
v.
BRACEWELL.

the reservoir, goits, weirs, and floodgates, warehouses and other outbuildings and appurtenances; which said mill and premises are now, or late were, in the occupation of the said W. Bracewell, T. Bracewell, and C. Bracewell."

Sarah Bracewell, by a lease dated 21st November, 1860, demised the premises to the plaintiff for twenty-one years from the 2nd of February, 1860, by the same description, except that the words "thereto belonging" were added after "appurtenances," and that the occupation was described as that of William Bracewell.

The defendant, who owned the land higher up the stream, and who was also in occupation of Tom Milner's Ing, had since 1859 diverted the water from the stream to a mill upon his land, and both detained and consumed it, so that the working of the plaintiff's mill became almost impossible.

The cause was tried before Keating, J., at Leeds, at the spring assizes, 1866, when a verdict was found for the plaintiff for 250*l*. A rule having been obtained for a new trial, on the ground that the plaintiff was a mere licensee, and not a riparian proprietor, and had no right to the water or to maintain the action, and that the learned judge should have so directed the jury, and also on the ground that the verdict was against evidence,

May 29, *Manisty, Q.C.*, and *Kemplay*, shewed cause. If the plaintiff were to be treated as merely in occupation or quasi occupation of the use of the water, it would perhaps be impossible to contend in this court after the decision of the Exchequer Chamber in *Whaley* v. *Laing* (1), and the interpretation of that case by Bramwell, B., in *Stockport Waterworks Company* v. *Potter* (2), that he could maintain the present action. But the plaintiff is not merely in occupation; he is in occupation by a lawful title derived from the riparian owner. Were that title merely the precarious and permissive one of a licensee, the plaintiff would still, as against the defendant, who is a wrong doer, be entitled to maintain an action. But he is in fact, at the least, the grantee of a right of enjoyment, which the riparian owner was entitled to transfer to him; and even if, as against that owner, the existence of the memorandum is considered to prevent the sixty years' enjoyment

(1) 3 H. & N. 675, 901; 27 L. J. (Ex.) 422. (2) 3 H. & C. at p. 318.

from constituting an absolute right, yet as against the defendant it is a sufficient title, for there is evidence of a lawful possession, and no evidence of its determination. Though a deed would be necessary to create the right, a deed may be presumed, and for the present purpose it is not necessary to assume that the deed made a grant in fee simple. The contention that such a grant is possible is opposed to the decision of this Court in *Stockport Waterworks Company* v. *Potter* (1), but the judgment there was not unanimous, and the Court is asked, if necessary, to reconsider that decision. The right to the use and enjoyment of the flow of water in a natural stream is a right which, like other rights of property, the owner is entitled to grant to a third person, provided it is granted as appurtenant to land, and for the use and benefit of the land in respect of which the grant is made. It is so granted and used here, and the difficulty which occurred in *Ackroyd* v. *Smith* (2) is therefore avoided. The objection made to such a grant on the ground of convenience is not well founded; for, in the first place, as is pointed out by Bramwell, B., in *Stockport Waterworks Company* v. *Potter* (3), the inconvenience would be no less if a foot of the actual bank were granted, though the grantee's title would then be unassailable. In the second place, the decision in *Sampson* v. *Hoddinott* (4) shews that the riparian owner is entitled to make no such use of the stream as in any way materially alters its flow, though within that limit he is entitled to make what use of it he will; his enjoyment, then, is not any more restrained by the possibility of such a grant than it would be otherwise; for he could in no case lawfully use the stream so as to materially affect it, and it can be no ground of complaint that he is not allowed to exceed his legal right. But, further, this case may be distinguished from *Stockport Waterworks Company* v. *Potter* (1) on two grounds. First, it is alleged in the declaration that the plaintiff was possessed of the goit, this possession is traversed, and the issue is found for the plaintiff. The verdict stands, therefore, that the plaintiff is possessed of the goit, which includes a portion of the bank itself, and therefore constitutes him an actual riparian pro-

(1) 3 H. & C. 300. 10 Jur. N.S. 1005
(2) 10 C. B. 164; 19 L. J. (C.P.) 315.
(3) 3 H. & C. at p. 320. 10 Jur. N.S. 1007
(4) 1 C. B. (N.S.) 590; 26 L. J. (C.P.) 148.

1866

NUTTALL v. BRACEWELL.

prietor. And this finding is consistent with the evidence, for there is nothing in the agreement or in the enjoyment inconsistent with the supposition of a demise of the goit itself. Secondly, this may properly be treated as a case of the diversion of a stream, or the division of it into two courses, which is the case suggested in the judgment of the majority of the Court in *Stockport Waterworks Company* v. *Potter*. (1) In this view, then, the plaintiff has the sanction of that judgment for saying that he is a riparian proprietor in respect of the goit, and entitled to the ordinary riparian rights.

Overend, Q.C., Field, Q.C., and *Rew*, in support of the rule. This is nothing but the ordinary case of water drawn from a stream by a sluice, and does not at all resemble the case of a divided course. The difficulties and inconveniences pointed out in *Stockport Waterworks Company* v. *Potter* (1) exist here equally; either, therefore, the grounds of that decision extend to the case of a divided stream, or else this is not such a case as was contemplated in the passage cited from the judgment. Nor is the right to the flow of the water claimed by the plaintiff in his declaration as a riparian right, but he alleges the possession of a mill and a goit, and a right by reason thereof to a flow of the water of the stream down the goit to his mill. Neither is there any pretence for saying that there has been any demise of the goit itself; neither the agreement nor the enjoyment lead to such an inference. The agreement permits the owner of the mill to make a goit through Bagshaw's land, and to have the water flow through it on paying an annual acknowledgment, and there is nothing in the enjoyment to shew any greater right. The case is therefore reduced to the same question as that decided in *Stockport Waterworks Company* v. *Potter* (1), and it is submitted that that decision was right. First, the argument of convenience on which the Court proceeded is valid. The riparian owner is competent to acquire rights of extraordinary use, and he is interested in not having this lawful kind of acquisition rendered more difficult by the creation of new, unseen, and unascertainable interests. The reasoning is analogous to that on which *Ackroyd* v. *Smith* (2), *Keppel* v. *Bailey* (3), and

(1) 3 H. & C. 300.
10 Jur. (N.S.) 1005.
(2) 10 C. B. 164; 19 L. J. (C.P.) 315.
(3) 2 My. & K. 517.

Hill v. *Tupper* (1), were decided. Secondly, such a grant is contrary to the nature of the right to the flow of a natural watercourse as established in *Mason* v. *Hill*. (2) The right is not indeed founded on the fact of appropriation, as was formerly thought, but it is founded on the fact of the power of appropriation. The riparian owner, having access to the bank, has the natural power of taking the water, and this is the origin of his right to take it. He cannot give the same right to another person who has not that right of access, and this reasoning is adopted in *Stockport Waterworks Company* v. *Potter*. (3)

[MARTIN, B. As a general rule, is it not true, as was said by my Brother Bramwell in that case, that if a man has any kind of property, he is entitled to grant to another a part of the benefit which the law gives him in it? He has, as part of his rights of property in the land, the right to take the water of the stream flowing through it, and why may he not grant that right to another?]

Ackroyd v. *Smith* (4) shews that the right is limited.

[MARTIN, B. There, and in *Hill* v. *Tupper* (1), it was attempted to create a right in gross, but here the right is claimed as appurtenant to land and for the use of the land.]

In *Miner* v. *Gilmour* (5), where the rights of a riparian proprietor are laid down, no such right is contemplated in any other person. But even supposing it were competent to the riparian owner to make such a grant, there is no evidence of a grant here; the plaintiff's right is merely that of a licensee, and *Whaley* v. *Laing* (6), and the comments on that case in Gale on Easements, p. 280 n, are opposed to the right of a licensee to sue.

Cur. adv. vult.

On June 26, the Court (Pollock, C.B., Martin, Bramwell, and Channell, BB.) gave judgment for the plaintiff, discharging the rule, but postponed the statement of their reasons.

Nov. 3. The following judgments were delivered:

(1) 2 H. & C. 121; 32 L. J. (Ex.) 217.
(2) 5 B. & Ad. 1.
(3) 3 H. & C. at pp. 326, 327.
(4) 10 C. B. 164; 19 L. J. (C.P.) 315.
(5) 12 Moo. P. C. at p. 156.
(6) 3 H. & N. 675, 901; 27 L. J. (Ex.) 422.

1866

NUTTALL v. BRACEWELL.

PIGOTT, B., read the judgment of MARTIN, B. This is an action for the recovery of damages for the abstraction of water from a natural stream, called Corn Mill Beck, by the defendant, an upper riparian proprietor, whereby damage was caused to the plaintiff, the occupier of a mill called Coates Mill. Coates Mill is an old mill, erected upon land which for some distance abuts upon the stream in question; it is worked by water power obtained from the above stream. Prior to the year 1804, the water appears to have been taken from the stream by a goit leading into a reservoir, and thence to the mill by another goit; these goits and the reservoir are all in the land on which the mill stands. In the year 1804, a Mr. Bagshaw was the owner of a close called Tom Milner's Ing, which also abuts upon the stream, and is immediately above the sluice; and on the 14th of March in that year, by a memorandum of agreement not under seal, Mr. Bagshaw agreed for himself and his heirs to allow William Bracewell, who was then the owner of Coates Mill and the land adjoining it, to make a goit for the conveyance of the water of the stream to the mill through the Ing, beginning at a certain place, and to extend to the boundary of the Ing, then entering the land of Mr. Bracewell, to be fifty yards in length, and 5*s.* a year was to be paid by Mr. Bracewell for this and another water privilege. This goit was made, and it began at a weir across the stream at Heble Bridge, which at the trial was alleged to be the property of the plaintiff; and from that time until the present the water of the stream ran in part down this goit towards Coates Mill, the residue of the water running in the old channel, so that the water of the stream entered the land upon which Coates Mill stands in two channels. It does not appear that injury was done to any one by the making or use of the goit. Neither the owner above, nor the owner below, seems to have sustained the slightest injury or inconvenience. The plaintiff is the occupier of Coates Mill, and the defendant, who, as has already been stated, is a riparian proprietor above, abstracted the water of the stream above, and to such an extent that the jury assessed the plaintiff's damages at 250*l.* But it was contended that he had no remedy for this damage, that he had no right of property in the goit, or in the flow of the water in it, in respect of which he could maintain an action; that he was a mere licensee, and had not any property.

1866

NUTTALL v. BRACEWELL.

The application and use of flowing water to work machinery is as old as the law. Corn mills have existed from time immemorial, and it appears, from old legal authorities, that fulling and other mills worked by water for the purpose of manufacture are of a very ancient date. Until the last century, steam as a power was, if known, not much in use; and until it was introduced, water power was very generally used, and it is still the cheapest when available. The mill is sometimes situated upon the bank of the natural stream, but more usually at some little distance from it; the water is conveyed to it by a goit or artificial cut, leading from the stream, and then, after turning the wheel of the mill, flows away in what is commonly called the tail goit. So, also, water was and is very frequently conveyed from the natural stream in the same manner for purposes of irrigation. And it is not too much to say, that the value of actual or supposed water rights of this character throughout England may be estimated by hundreds of thousands, perhaps millions. The law has been supposed to be well settled, and in my opinion is nowhere more clearly stated than by Lord Kingsdown, in *Miner* v. *Gilmour*. (1) He says: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of water flowing past his land; for instance, to the reasonable use of the water for domestic purposes and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up a stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to intercept the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

According to the law so enunciated, and which no doubt is the law, it would be competent for Mr. Bagshaw, or his successor in ownership of Tom Milner's Ing, to erect a mill upon it, and take the water from the stream to work it, provided he neither penned

(1) 12 Moo. P. C. at p. 156.

1866

NUTTALL v. BRACEWELL.

back the water upon his neighbour above, nor injuriously affected the volume and flow of the water of the stream to his neighbour below. And the law favours the exercise of such a right; it is at once beneficial to the owner and to the commonwealth. And if this be so, why may not the owners of two adjoining closes agree together, for their mutual benefit, to take the water through a goit from the close of the one into the close of the other, returning the water to the stream in the close of the latter, and thereby doing no injury to any one. In point of fact, very many goits pass through the land of different landowners between the place where the water is taken from the stream and the mill where it works the machinery. The right to a flow of water in a goit is a well-known easement, and is an incorporeal hereditament, and although it is not competent for an owner of land to render it subject to a new species of burthen at his fancy or caprice, the burthen of one man's land being subject to the right of another to have a flow of water running through it to work his mill, is as old as the law itself, and in my opinion is the subject of property and of grant, and not merely of licence. It is true that, being an incorporeal hereditament, it cannot be created so as to immediately bind the original grantor, except by deed under seal; but, assuming that sixty years' undisturbed possession, originating in the agreement of 1804, does not confer a good title as against Mr. Bagshaw and his heirs, I think the actual possession and enjoyment of the goit by the plaintiff gives a good and valid right of action against the defendant, a wrong doer. The case of *Stockport Waterworks Company* v. *Potter* (1) was the sole authority relied upon by the defendant's counsel. It was a case where the water of the river Mersey was abstracted for the use of the inhabitants of Stockport for domestic purposes, and the complaint was that the defendants had fouled it. It is therefore different from the present. My Brother Bramwell differed from the other three judges of this court. I do not pretend to say which judgment is right. It suffices to me that it is not directly in point, and I decline to extend it, if indeed it is capable of being so extended as to hold that the plaintiff has no right of action. In my opinion the rule for a new trial ought to be discharged.

(1) 3 H. & C. 300.

1866

NUTTALL v. BRACEWELL.

BRAMWELL, B. The late Lord Chief Baron and my Brother Channell think that this case is not governed by *Stockport Waterworks Company* v. *Potter*. (1) As the judgment in that case was theirs, I ought to defer to their view of it, and it therefore does not prevent me from saying, as I do, that I think the plaintiff here is entitled to recover. I abide by the reasons I gave in the other case, which I understand are considered not erroneous, but inapplicable to the circumstances of that case. I wish, however, to add to what I then said. The principle on which it seems to me the plaintiff is entitled to recover is this. As a general rule, when a man has a property he may grant to others estates in and rights of enjoyment of it, and the grantees may maintain actions against those who disturb them. I do not say there is no exception; there may be for aught I know. A man entitled to land may grant leases, may grant the exclusive herbage, a right of depasturing, a right of way, a right to game. He may grant the mines underneath, or the right to get minerals, and other rights in or over the property, or of enjoyment of it. So, if the land is covered with water, he may grant rights of fishing. So the grantees of mines may regrant. So of chattels. The owner may let them to hire. And in all these cases the grantee may maintain actions in respect of the rights granted. Now what is the case here? Mr. Bagshaw is a riparian proprietor. Subject to the rights of those opposite and those lower down the stream, he may divert the water where it flows by his land. Why may he not grant this right or mode of enjoyment? I say the burthen of proof is on those who say he may not. This right of his, this mode of enjoying his property, is presumably grantable like others. Those who deny this must give a reason for it, and I have heard of none. It seems to me that all reasons of public convenience, and all other reasons, make this right grantable as much as any other right. But it may be said, How is *Hill* v. *Tupper* (2) distinguishable? One mode of enjoying land covered with water is to row boats on it, and the owner has an exclusive right. I think it easy to point out the distinction. It was competent for the grantors in that case to grant to the plaintiff a right of rowing boats on the canal; and had any one interfered with that right, the grantee might have maintained an

(1) 3 H. & C. 300. 10 Jur. (N.S.) 1005

(2) 2 H. & C. 121; 32 L. J. (Ex.) 217. 9 Jur. (N.S.) 725

1866

NUTTALL v. BRACEWELL.

action against him. But the plaintiff there did not sue for any such cause of action. He sued, not because his rowing was interfered with, but because the defendant used a boat on the water. Now suppose the grantors there had granted to the plaintiff a right to row boats, and to J. S. a right (as far as the word is sensible), that no one but the plaintiff should row boats on the canal; clearly J. S. could not have maintained any action. He would not have sued in respect of any estate, or of any easement, or of any mode of enjoyment which was disturbed. Nor did the plaintiff in that case. It makes no difference that the two rights as far as possible were in him, viz. a right to row, and a right to exclude others. It was in respect of the latter he sued, and it mattered not he possessed the former. But apply this reasoning to the present case. The plaintiff complains that his right is interfered with. His right is not merely that no one shall take part of the water, but that the plaintiff shall take *all*, and this the defendant has prevented. On these grounds, as well as for the reasons I gave in *Stockport Waterworks Company* v. *Potter* (1), I think our judgment must be for the plaintiff.

CHANNELL, B., read the judgment of himself and POLLOCK, C.B. The facts of this case are very fully stated in my Brother Martin's judgment. The main question argued at the bar, indeed the only question argued on the part of the defendant was, whether or not this case was distinguishable from, or governed by, the case of *Stockport Waterworks Company* v. *Potter* (2); but the plaintiff contended that that decision, if applicable to the present case, was wrong. That case was argued before the Lord Chief Baron Pollock, my Brother Bramwell, my Brother Wilde (then a member of this court), and myself. The judgment of this Court was not unanimous; my Brother Bramwell strongly dissented from the judgment delivered by the Lord Chief Baron Pollock as his judgment, and which, as stated by the Lord Chief Baron Pollock, had the sanction of my Brother Wilde, though he, being no longer a member of this court, took no part in it. As that, though not an unanimous judgment, was a judgment of the majority of the members of this court who heard the argument, I should, even if I had altered my opinion,

(1) 3 H. & C. at p. 318. 10 Jur. N.S. 1007

(2) 3 H. & C. 300. 10 Jur. N.S. 1005

1866

NUTTALL v. BRACEWELL.

feel myself bound by the decision as governing the present case, unless this is distinguishable. But the present case seems to me to be distinguishable. I quite agree that the passage quoted by my Brother Martin from Lord Kingsdown's judgment in *Miner* v. *Gilmour* (1) very clearly, as well as accurately, states the law applicable to running streams. I think, however, that the decision in *Stockport Waterworks Company* v. *Potter* (2) was quite in accordance with the law as so stated; and, further, if the decision in the *Stockport Waterworks* case was wrong, then it appears to me that Lord Kingsdown's statement would require qualification. The *Stockport Waterworks* case in effect decided that a riparian proprietor cannot grant away his water rights apart from his estate, so as to place the grantee in the same position with respect to the other riparian proprietors as he occupied himself. Now if that is wrong, then a riparian proprietor is not entitled to use the stream for extraordinary purposes, provided he abstains from thereby interfering with other proprietors, as Lord Kingsdown says, but "provided he *also* abstains from interfering with *the grantees* of other proprietors." I am not aware of any such additional restriction on the right of a riparian proprietor. It would go well nigh to destroy his rights altogether, for that can scarcely be called a right which is subject to an indefinite restriction, unascertained and practically unascertainable. I consider that the rights of a riparian proprietor with respect to the stream are limited only by those of persons in a similar or analogous position with respect to the stream as himself. These rights he can easily ascertain, and by that means ascertain his own. But he has no means of ascertaining who may be grantees, or what may be the value of their grant. If, therefore, a riparian proprietor grants to some one, not such a proprietor, a right to abstract water from the stream, as in the *Stockport Waterworks* case, I think the grantee can sue only the grantor for any interference with him. If, however, two adjoining riparian proprietors agree to divert the stream, so that it shall run in two channels instead of one, the water passing again into the old stream below their land, and flowing down to the lower proprietors as before, the case is, I think, different. What is done is apparent to all, and any use that may be made of the new stream, as to turn

(1) 12 Moo. P. C. at p. 156. (2) 3 H. & C. 300.

1866

NUTTALL v. BRACEWELL.

a mill for instance, is as apparent as if the mill were upon the old stream. What is done by the two proprietors may be supposed to be a more convenient way of making use of the flow of water while it in no way diminishes or affects the rights of the other proprietors.

This distinction is alluded to in the judgment of the majority in *Stockport Waterworks Company* v. *Potter* (1), where it is said: "The case where a riparian proprietor makes two streams instead of one, and grants land on the new stream, seems analogous to a grant of a portion of the river bank, but not analogous to a grant of a portion of the riparian estate not abutting on the river. In the case of a grant of land on a new stream, the grantee obtains a right of access to the river, and it is by virtue of that right of access that he obtains his water rights." Now, in the present case, Coates Mill is on an estate abutting on the river. Prior to 1804, the water came to the mill from the stream through a goit and a reservoir, all on the mill-owner's estate. Since then there has been either an additional supply of water or a substituted one, I am not sure which, through a goit leaving the river higher up on the estate of another proprietor. Now it seems to me that the goit is to all intents and purposes a mere stream, and any person having land upon it would have the rights of a riparian proprietor, viz. to use the water in any way not interfering with others. I see no reason why the law applicable to ordinary running streams should not be applicable to such a stream as this, for it is a natural stream or flow of water, though flowing in an artificial channel. It may be that the case of an entirely artificial stream, as one flowing from a mine for instance, would be different; but that an artificial stream may be on the same footing as a natural one as regards the rights of riparian proprietors is held in *Sutcliffe* v. *Booth*. (2) I think, therefore, that in the present case the plaintiff has a right of action, and the rule for a new trial ought to be discharged.

Rule discharged.

Attorneys for plaintiff: *Risley & Stoker, agents for W. Paget, Skipton.*

Attorneys for defendant: *Raw & Gurney, agents for Henry Robinson, Settle.*

(1) 3 H. & C. at p. 327.

(2) 32 L. J. (Q.B.) 136.

HUFFER *v.* ALLEN AND ANOTHER. 1866

Nov. 14.

Action for maliciously signing Judgment—Malicious Arrest—Estoppel—Judgment—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *s.* 27.

A. having issued a writ of summons against B., specially indorsed for 28*l.*, B., without appearing to the writ, paid 10*l.* to A., on account of the debt. A. afterwards, under the Common Law Procedure Act, 1852, s. 27, signed judgment for default of appearance, for the full amount of 28*l.* and costs, and issued a ca. sa., indorsed for that amount, under which B. was arrested, and paid the sum demanded. B. having brought an action against A. for maliciously and without probable cause signing judgment and issuing execution:—

Held, that, whilst the judgment stood for the full amount, it estopped the plaintiff from denying the correctness of the judgment or of the execution.

Quære, whether, if the judgment had been rectified, by reducing it to the amount for which it ought to have been signed, as in *Hodges v. Callaghan* (2 C. B. (N.S.) 306), the action would have been maintainable? 2 Jur. N.S. 369.

DECLARATION. First count, that the plaintiff being indebted to the defendants in the sum of 28*l.*, the defendants commenced an action against the plaintiff, in the Queen's Bench, for the recovery of the debt by a writ specially indorsed and personally served; that the plaintiff, before appearance, and before judgment, paid to the defendants, and the defendants accepted, the sum of 10*l.* on account of the debt: that the defendants, after such payment, wrongfully and maliciously, and without reasonable or probable cause, signed judgment for default of appearance for the full amount of the debt of 28*l.* and costs, and thereby wrongfully and maliciously, and without reasonable or probable cause, procured the said judgment to be signed for the recovery of a debt wherein the sum recovered exceeded the sum of 20*l.*, exclusive of costs; that the defendants wrongfully and maliciously, and without reasonable or probable cause, issued a writ of ca. sa. against the plaintiff, indorsed for 32*l.*, for the debt of 28*l.* and costs and costs of execution, under which the plaintiff was arrested, and was compelled, in order to procure his discharge, to pay the full amount indorsed and sheriff's fees. Averment that at the dates of the judgment and of the writ only 18*l.* was due from the plaintiff to the defendants, which the plaintiff was ready to pay; and claiming damages in respect of the 10*l.*, the extra fees and costs, and the detention.

Demurrer and joinder.

1866

HUFFER v. ALLEN.

Second count, similar to the first, except that it only stated that the defendants recovered judgment against the plaintiff for 28*l.*, that "the now plaintiff paid to the now defendants, and they accepted and received from him, the sum of 10*l.* for and on account of the said debt and costs in the said action," and that the defendants wrongfully, &c., issued a ca. sa. for the full amount, &c.

Seventh plea to the second count, that the plaintiff ought not to be admitted to say that the plaintiff paid to the defendants, and that the defendants accepted, the sum of 10*l.* on account of the debt and costs in the said action, for that the plaintiff made the supposed payment of the sum of 10*l.* after the commencement of the said action and before judgment, and that after such supposed payment, such proceedings were thereupon had in that action, that afterwards, and before the suit, it was considered by the judgment of the Court in the said action that the now defendants should recover against the now plaintiff the whole of the said debt and costs in the said action; and the said judgment still remains in force; and this the defendants are ready to verify; wherefore they pray judgment, if the plaintiffs ought to be admitted, &c. (1)

Demurrer and joinder.

Hayes, Serjt. (*Grantham* with him), in support of the demurrer to the declaration, and of the plea. The two demurrers come to the same point; the second count leaving the time of payment uncertain, the plea fixes it to a time before judgment. In each case, therefore, the defendants' contention is that the judgment is an estoppel. The pleadings shew a judgment of the Court for the full amount, and whilst that stands unimpeached, it is conclusive evidence as between the parties that the whole amount for which it was signed was due. It is an estoppel which can be removed by nothing but fraud; in the absence of fraud, the existence of the judgment is evidence of its correctness, and none the less so for being signed for default of appearance under 15 & 16 Vict. c. 76, s. 27. The case of *Gilding* v. *Eyre* (2) is not in favour of the plaintiff, for there the payment was made after judgment, and what was

(1) There was also a replication of fraud to this plea, which was demurred to; but that replication and demurrer were withdrawn.

(2) 10 C. B. (N.S.) 592; 31 L. J. (C.P.) 174.

1866

HUFFER v. ALLEN.

complained of was the issuing of a writ for the full amount after the judgment had been partially satisfied. But here, in order to impeach the issuing of the writ, it is necessary to impeach the judgment itself, for if the judgment was right the writ was right also. The plaintiff has adopted the wrong course. If the judgment was in fact signed for too much, he ought to have applied to the Court to reduce the amount, as was done in *Hodges* v. *Callaghan* (1); and in that case he would probably have been allowed to bring no action, as the act complained of might very likely be due to a mistake, the defendants' attorney signing judgment in ignorance of the payment.

H. Matthews (*Griffits* with him), in support of the declaration and the demurrer to the plea. If the plaintiff is unable to maintain this action he has no remedy for the wrong he has suffered, for *De Medina* v. *Grove* (2) shews that no action for money had and received will lie for money paid under such circumstances. On the other hand, he is compelled to pay the money in order to obtain his liberty, and has suffered by the compulsory payment and by the imprisonment a double wrong, for which he ought to have redress. It is not necessary to impeach the judgment, for the judgment is evidence only that the amount for which it was signed was due at the time when it was sued for; it does not, therefore, conclude the plaintiff here from saying that the writ was wrongly issued. But, if necessary, *Hodges* v. *Callaghan* (1) is an authority for saying that the judgment ought not to have been signed for the full amount, and is therefore irregular.

[BRAMWELL, B. It is certainly said there that the judgment *ought* to have been signed only for the sum really due; but that *ought* must mean morally, not legally. Suppose the payment after action disputed, or the fact of payment, or the authority of the person to whom it was made, or the appropriation of it, how can the regularity of the judgment depend upon these matters?]

On the other hand, these matters cannot, as was said by the Court in *Gilding* v. *Eyre* (3), be tried upon affidavit by a judge, and how, except in the present form of action, can they be sub-

(1) 2 C. B. (N.S.) 306; 26 L. J. (C.P.) 171.

(2) 10 Q. B. 152, 172.

(3) 10 C. B. (N.S.) 592; 31 L. J. (C.P.) 174.

1866

HUFFER v. ALLEN.

mitted to the decision of a jury? The demurrer admits the payment of the money, it therefore admits the malice and the absence of reasonable or probable cause.

Hayes, Serjt., was not called on to reply.

KELLY, C.B. Our judgment must be for the defendants. I say so with regret, because no doubt if the act of the defendants was knowingly done, that is, if they knew that the debt was reduced below 20*l.* at the time of signing judgment, their act was highly unjustifiable. But we must here determine the legal question, which is, whether the previous judgment, which is in contemplation of law the act of the Court, estops the plaintiff from bringing this action, the first step in which is to impeach that record. It is a simple and unanswerable argument against its maintenance, that it is not competent to either party to an action to aver anything either expressing or importing a contradiction to the record, which, while it stands, is as between them an evidence of uncontrollable verity. Now here an action is brought for 28*l.*; before appearance, the defendant in that action makes a payment reducing the debt to 18*l.*, but takes no further steps; the then plaintiffs sign judgment for 28*l.*, and proceed to issue execution, under which the defendant is taken. The then defendant now avers that the judgment was signed, and the execution issued, wrongfully and maliciously, and without reasonable or probable cause, and on this averment founds his action against the judgment creditors. But he cannot make this averment, and therefore cannot maintain this action, whilst the judgment, against which no averment can be admitted, stands as evidence that when judgment was signed the debt which the then defendant owed was 28*l.*, and not 18*l.* It is contended that if he cannot maintain this action he is without remedy. But that is not so. Although while the judgment stands it cannot be contradicted, it is always open to the Court on motion to correct its judgment, to relieve any party who may be unduly prejudiced by any act done under its order, and to prevent any injurious consequences which may flow from its error. As soon as the then defendant ascertained that judgment was signed for 28*l.* it was competent to him to apply to the Court or a judge at chambers to reduce the amount

from 28*l.* to 18*l.*, or (if execution had been issued) to set aside the execution on the payment of the less sum. As he has failed to do this, the judgment stands in the way of his present action. Whether, if he had done it, he could have maintained his action, it is unnecessary to say. If the former plaintiffs actually knew of the payment, and nevertheless signed judgment and issued execution for the full amount (for it may have been merely an error, caused by the payment being made to the plaintiffs, and judgment being signed in ignorance of this fact by their attorney), I do not see any reason why the present plaintiff should not, after obtaining from the Court the rectification of its judgment, maintain an action against them. But it is unnecessary to decide this; it is sufficient to say that the existing judgment is here an insuperable impediment.

BRAMWELL, B. I entirely agree with my Lord, except that I cannot say that I regret the result of our judgment, for the plaintiff has himself caused the difficulty by not pursuing the proper course. That course would have been to apply to the Court to make the judgment regular; he would then have got his money back, together with the costs caused by the then plaintiffs' irregularity, but he would probably also have been restrained from bringing this action. Rather than run that risk, he has chosen to let the judgment stand, and resort to this remedy, and he has deservedly failed. But however this may be, we must decide for the defendants, for the plaintiff cannot attack any of their proceedings unless he can attack the judgment, and this he clearly cannot do. His declaration is equivalent to saying, "You have got the judgment of the Court, but that judgment you knew to be wrong." To admit such a declaration would be contrary to all analogy and precedent. It is said, the demurrer admits that the 10*l.* was paid as alleged, and it therefore admits that the judgment was wrongfully signed. But this is not so; the demurrer amounts only to this, "I decline to enter into the question which you raise; you are concluded by the judgment." It might as well be said that the right to maintain an action for malicious prosecution was vested by the mere allegation of malice; but in such a case also the demurrer merely says that the plaintiff has not shewn himself entitled to maintain his suit. Whether if the judgment were

1866

HUFFER v. ALLEN.

amended without terms the plaintiff could have brought an action, is not to my mind clear. Although in a sense it may be said that the former plaintiffs ought not to have signed judgment for the greater sum, yet on the other hand, in strictness it was the duty of the defendant to appear and plead, and pay the money into court. As to this, I will only say that I pronounce no opinion, not having satisfied my mind upon it.

CHANNELL, B. I also think that the defendants are entitled to our judgment upon both demurrers, which result substantially in the same point. It is said that the plaintiff can have no action for money had and received, and this is true, for the money was paid under the process of the Court. But it is sought on that ground to impress us in favour of the plaintiff's claim, by saying that if it be denied he is without remedy for the wrong done him. It is clear, however, that, whilst the judgment is on the rolls of the court in the form stated in the pleadings, it must be taken to have been rightly signed for the greater amount. If the record were amended, the amendment would have relation back to a time previous to the bringing of the action, and the judgment would stand for 18*l.* at that date; but I will not give any opinion on the question, whether in that case the plaintiff could have maintained an action.

PIGOTT, B. I am of the same opinion. It is only necessary to say, that the plaintiff cannot here succeed. If the judgment were set right, the defendants would then appear to have issued a ca. sa. wrongfully and without reasonable or probable cause, and to have thereby given the plaintiff a good ground of action. But I give no opinion on this point; it is sufficient to say, that while the judgment stands, it is not competent to the plaintiff to aver anything against it.

Judgment for the defendants.

Attorneys for plaintiff: *Cooke & Talbot.*

Attorneys for defendants: *Rooks, Kenrick, & Crook.*

TETLEY AND OTHERS *v.* WANLESS. 1866 *Nov.* 16.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Deed of Arrangement — Inequality — Release — Tender of Composition — Scheduled Creditors.*

A deed of arrangement, under s. 192 of the Bankruptcy Act, 1861, between the debtor of the first part, J. D. a surety of the second part, and the several persons creditors of the debtor whose names were thereunto subscribed and all other the creditors of the debtor of the third part, after reciting that the defendant was indebted "to the said several creditors in the several sums of money set opposite to their respective names in the schedule" thereunto written, and that it had been agreed by the requisite majority in number and value of the "said several creditors" to accept the composition and security therein expressed in full satisfaction of their respective debts, witnessed that, in consideration of the joint and several promissory notes of the debtor and J. D. for the payment of such composition "on the respective sums of money aforesaid," they, the said creditors, parties thereto of the third part, released to the defendant all actions, debts, &c., which they had against him, and accepted the stipulated composition in full satisfaction of the debts and sums due to them "*specified in the schedule*;" and the debtor and J. D. covenanted with each and every of the creditors parties thereto of the third part, to pay the composition "upon their respective debts *as aforesaid*," and to make and deliver to them the notes securing the same:—

Held, first, that the release in the deed was absolute and unconditional, and not confined to scheduled debts; and, secondly, that there was no inequality in the deed, as on the true construction of it all the creditors were equally entitled to the benefit of the covenants therein contained.

Declaration for money payable by the defendant to the plaintiffs for goods bargained and sold, goods sold and delivered, for interest and money due on accounts stated.

Plea, that after the accruing of the plaintiffs' claim, and after the 11th October, 1861, the defendant then being a debtor within the meaning of the Bankruptcy Act, 1861, and indebted to divers persons, a deed bearing date the 7th of May, 1866, was entered into between the defendant of the first part, John Dobbing of the second part, and the several persons respectively creditors of the defendant, or the authorized agents of such creditors (*not only those whose names and seals were thereunto subscribed and set, but also all other the creditors of the defendant*), of the third part; and by the said deed, after reciting that the defendant was indebted to the said several creditors, in the several sums of money set opposite to their several and respective names in the schedule thereunder

1866

TETLEY v. WANLESS.

written, and that it was agreed by a majority in number, representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10*l.* and upwards, to accept the composition and security therein expressed in full satisfaction of such respective debts, it was witnessed that in pursuance of the said agreement, and in consideration of the joint and several promissory notes of the defendant, and the said John Dobbing, for payment to the said respective creditors of the defendant of the composition of 5*s.* in the pound on the respective sums of money aforesaid, dated on the 27th of April last past, and payable to the respective creditors of the defendant four months after the date thereof, they the said creditors, *parties thereto of the third part*, for themselves and their heirs, &c., did, to the intent that those presents should be effectual and binding on all the creditors of the defendant, pursuant to the provisions of the Bankruptcy Act, 1861, thereby release unto the defendant, his heirs, &c., all actions, suits, debts, claims, and demands which the creditors of the defendant had or had had against the defendant, and did thereby accept the said composition so payable as aforesaid in full satisfaction, and discharge of the several debts and sums of money due and owing to them by the defendant, *specified in the said schedule;* and they the creditors, parties thereto of the third part, did also, for themselves, their heirs, &c., covenant with the defendant that it should be lawful for him to plead those presents in bar to any action or suit which might thereafter be brought by any of them against him; and each of them, the defendant and the said John Dobbing, their executors, &c., thereby covenanted with each and every of the creditors, parties thereto of the third part, to pay to each and every of the creditors of the defendant a composition of 5*s.* in the pound upon their respective debts *as aforesaid*, and to make and deliver to them upon demand, at or immediately after the execution of those presents by the said majority of the said creditors the said promissory notes, and to pay the same when due. Averments of the assent of the statutory majority and of the due execution and registration of the deed, and that all conditions had happened and times elapsed necessary to make the deed as valid and binding on all the creditors of the defendant as if they had been parties thereto; that the plaintiffs were creditors of the defendant within

the meaning of the deed and of the Bankruptcy Act, 1861; that the claim in the declaration was a claim within the said deed, and in respect of which the said composition was payable, and that by reason of the premises the defendant became entitled to plead the said deed in bar to this action.

Replication joining issue on the plea.

The action was commenced on the 4th April, 1866, more than a month before the execution of the composition deed set forth in the plea, which, however, had been pleaded in bar, and not in formal words, to the "further maintenance" of the action. No tender of the composition to the plaintiffs, who were non-assenting and unscheduled creditors of the defendant, was specifically alleged in the plea, and at the trial before Lush, J., at the Cumberland summer assizes, 1866, none was proved to have been made. Under these circumstances a verdict was entered for the defendant, with leave reserved to enter it for the plaintiffs for 98*l.*, on the ground, first, that the plea was a plea in bar to the action generally, and not to the further maintenance thereof, and was not proved; and, secondly, that tender of the composition was put in issue by the replication and was not proved.

A rule was afterwards obtained in pursuance of the leave reserved; and also a rule calling on the defendant to shew cause why judgment should not be entered for the plaintiffs non obstante verdicto, on the grounds, first, that the deed mentioned in the plea did not release the plaintiffs' debt, not being a scheduled debt; secondly, that the provisions of the deed were unequal, the giving of the promissory notes being confined to scheduled debts; and, thirdly, that the plea was bad for not averring a tender of the composition.

Manisty, Q.C., and *Lewers*, shewed cause. The Common Law Procedure Act, 1852, s. 68, has abolished formal commencements and conclusions, and the plea which on its face shews by the date of the deed a defence arising after action brought, is a good plea to the further maintenance of the action: *Brooks* v. *Jennings*. (1)

[BRAMWELL, B. If the date of the deed is material, then the plea is good as a plea to the further maintenance of the action; but

(1) Law Rep. 1 C. P. 476: 12 Jur. (N.S.) 341

1866

TETLEY v. WANLESS.

it must be remembered that the date is not necessarily a part of the deed.]

It must be registered within twenty-eight days from its date, and that circumstance renders the date material.

[No further argument was heard on this point, the Court intimating that they would, if necessary, amend the plea by adding the formal words, the defendant paying the costs of the amendment. (1) It was urged, on the part of the plaintiffs, that in order to be good, even in its amended form, the plea must be limited to the debt sued for. The release in the deed could not apply to the damages and costs incurred, by reason of an action pending when the deed was executed, and could be no answer to a claim in respect of them (Bullen and Leake's Precedents of Pleading, 2nd edition, p. 388): *Thame* v. *Boast* (2); *Cook* v. *Hopewell*. (3) The Court, however, declined to amend in the limited form suggested, and accordingly the plea in its amended form was pleaded generally to the whole claim in the declaration.]

Again, it is objected that the tender of the composition was not averred in the plea, or that, assuming the general averment to be sufficient, it was put in issue by the replication and was not proved. As to the first point, the general averment of the performance of conditions precedent allowed by the Common Law Procedure Act, 1852, s. 57, includes an averment of tender, if tender was necessary to the release in the deed being a bar to the plaintiffs' claim. As to the second—assuming that tender was necessary—the replication admitted it. By the Common Law Procedure Act, 1852, s. 57, it is provided that the non-performance of a condition precedent must be specially pleaded, and therefore there should have been a special replication here, traversing the tender alleged.

(1) The Court were disposed to give the plaintiffs the costs of the cause up to the time of their confessing the plea, but it having been doubted whether the 22nd rule of Trinity Term, 1853—according to which "a plea containing a defence arising after action may be pleaded, together with pleas of defences arising before action, provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading such first-mentioned plea"—applies to a case where a plea to the further maintenance is pleaded alone, the plaintiffs claimed the costs of amendment only. See *Cook* v. *Hopewell* (11 Ex. 555). 2 Jur. N.S. 66

(2) 12 Q. B. 808.

(3) 11 Ex. 555. 2 Jur. N.S. 66.

1866

TETLEY v. WANLESS.

[BRAMWELL, B. The act of parliament says (s. 57) that a defendant shall not be at liberty to plead that all things necessary to enable the plaintiff to maintain his action have *not* happened; but there is also a provision (s. 77) that a plaintiff in a replication or subsequent pleading may traverse the plea or subsequent pleading of the defendant by a general denial. The framers of the act, whilst thinking it desirable to tie a defendant down to a denial of this or that condition precedent, nevertheless appear to have thought it safe to permit a general traverse at a subsequent stage.]

Such an interpretation of s. 77 would nullify to a considerable extent the beneficial operation of the act. But this point may be conceded, for in this case the release is *absolute*, and there was therefore no necessity either to allege or to prove a tender. The deed is made between the debtor and all his creditors, and they all absolutely and unconditionally release him from their claims: *Johnson* v. *Barratt* (1) is in point. Lastly, the deed is not unequal. No one class of creditors is privileged beyond another. The covenant to pay the composition and promissory notes is expressly with all of them.

Kemplay, in support of the rule. First, in order to make this release available against the plaintiffs a tender was necessary. *Johnson* v. *Barratt* (1) only decides that where there is an absolute release on one side and on the other an independent covenant to pay the stipulated composition no tender is necessary. In that case the release was "in consideration of the covenant," and was absolute. But here the release is in consideration of the promissory notes securing the composition; and before it is effectual the notes must be tendered. That being so, the tender must be alleged specifically in the plea. The general averment only covers conditions precedent to the deed being binding under the statute, but does not include anything to be done subsequently by the parties to the deed: *Fessard* v. *Mugnier*. (2) But assuming that it was sufficiently alleged, it was put in issue by the replication, according to the provisions of s. 77 of the Common Law Procedure Act, 1852, and should have been proved. Secondly, the release is qualified as well as conditional. It is confined to the scheduled debts, being

(1) Law Rep. 1 Ex. 65. (2) 18 C. B. (N.S.) 286; 34 L. J. (C.P.) 126.

1866

TETLEY v. WANLESS.

given in consideration of the promissory notes securing payment of the composition to the "said respective creditors on the respective sums of money aforesaid," and being in its terms limited to the debts "specified in the schedule." Thirdly, the deed is unequal. Although professing to be made with all the creditors, the recital contracts its operation and benefit to the scheduled creditors. Then the benefit of the covenant by the debtor and surety to pay the composition and make and deliver the notes extends to the scheduled creditors only. It is a covenant "with each and every of the creditors parties hereto of the third part," to pay to each and every of them the stipulated composition "upon their respective debts *as aforesaid*," and the only debts aforesaid are those mentioned in the schedule: *Dingwall* v. *Edwards* (1); *Buvelot* v. *Mills*. (2) A non-assenting and unscheduled creditor, therefore, is not in the same position with a scheduled creditor.

KELLY, C.B. I am of opinion that this rule should be discharged. Two questions, and two only, in the view the Court take of this case, have been raised requiring our decision. Both turn on the validity of the deed set forth in the plea as a composition deed. The first is, whether the release contained therein is an absolute and unconditional release, or whether it is conditional on the payment of the stipulated composition or on the delivery or tender of the promissory notes in the deed mentioned. I think that the release is absolute and unconditional; and I arrive at that conclusion by looking at the terms of the deed itself. It purports to be made between the debtor of the first part, one John Dobbing of the second part, and the whole body of the creditors of the debtor of the third part; and it recites that the debtor was indebted to "the said several creditors in the several sums of money set opposite to their several and respective names in the schedule hereunto written," and that it had been agreed by the requisite majority in number and value of the "said several creditors" to accept the composition thereinafter expressed in full satisfaction of their respective debts. The deed then witnessed that, in consideration of the joint and several promissory notes of the debtor and of Dobbing, for the payment to the said respective creditors of a

(1) 4 B. & S. 738; 33 L. J. (Q.B.) 161. (2) Law Rep. 1 Q.B. 104.

10 Jur. N.S. 386.

1866

TETLEY v. WANLESS.

composition of 5*s.* in the pound "on the respective sums of money aforesaid," they, the said creditors, "parties hereto of the third part," released to the debtor all actions, suits, debts, &c., which they might have against him. Now it is true that the recital in its terms relates only to the composition payable on the scheduled debts, and therefore, if this had been a case of mere assumpsit, it might be said that the consideration for the release was confined to a particular class of creditors, and therefore that the release was qualified. But this instrument is a deed, and no consideration at all is necessary to support the release; and although a consideration is averred, and may be insufficient to support a promise not under seal, still the deed is valid, unless indeed the consideration be illegal. Then the words of the release itself are absolute and unconditional, and it is given to the debtor by "the said creditors parties hereto of the third part," that is to say, by all the creditors, and amongst others, accordingly, by the plaintiffs. In my judgment, laying aside all questions as to the extent of the consideration, this is an absolute release of the debts of all the creditors. That being so, and the release being fettered by no conditions as to the tender or delivery of cash or notes to the creditors, I think the plaintiffs' claim must be held to be released.

Secondly, it is contended that the deed is unequal, and therefore not valid under the Bankruptcy Act, 1861. And I agree that if the effect of the whole deed were that the executing creditors or the creditors named in the schedule should alone be entitled to the benefit of the composition offered, the deed would be invalid. But if, upon an examination of the whole deed, it is found that an obligation is imposed on the debtor and his surety to pay the composition equally to all the creditors, this objection fails also. Now if what may be called the consideration clause alone is regarded, it does seem that the notes are to be delivered only to the scheduled creditors. On reading further, however, I find a covenant by the debtor and surety with "each and every of the creditors, parties hereto of the third part," *i. e.* with all the creditors, to pay the stipulated composition. This clause gives all the creditors an undoubted right to the full benefit of the composition; it makes them in equity, if not at law, parties to the deed. The observation is made that the covenant is to pay the composition upon the cre-

1866

TETLEY v. WANLESS.

ditors' respective debts "as aforesaid;" and it is argued that these words limit the covenant to the payment of a composition to the creditors named in the schedule. But I think such a reading of the clause would be repugnant to the contents of the deed taken as a whole. The words in question should rather be read as reason and common sense would appear to dictate. They come at the end of an express covenant with all the creditors. They should be referred, therefore, to those parts of the deed where all the creditors are mentioned, and be applied in this covenant to the debts of all. The covenant further provides for the delivery to "each and every of the creditors" of certain promissory notes. There may be some doubt whether this is a cumulative covenant or not—that is, whether the covenant is to pay 5*s.* in the pound in cash, and to secure the payment of 5*s.* more by the notes, or whether it is merely a covenant to secure 5*s.* in the pound by notes; but however that may be, the covenant is expressly entered into with all the creditors.

Both the first and second objections then fail. The release is absolute, and no tender of the notes is necessary; and the deed is not unequal, for the covenant is express to pay the composition to all, the plaintiff amongst the rest. The amendment suggested, therefore, having been made, I consider the plea in its amended form was proved. This rule must accordingly be discharged.

BRAMWELL, B. I am of the same opinion on both points. At the trial the defendant failed to prove his plea. An amendment was therefore necessary, and it having been made, I think the plea, thus amended, is proved. The deed therein set forth covenants with all the creditors to pay the stipulated composition; and looking at all its provisions, I think the release was absolute, and that no tender was necessary.

CHANNELL, B. I am also of opinion that the defendant is entitled to our judgment. It has been argued that the plea in its original form was not proved, but that ground of objection has been removed by the amendment made. Then there remain the questions raised by the application to enter the verdict for the plaintiffs on the points reserved, and by the motion to enter the judgment

non obstante veredicto, which are substantially the same. The first point for our decision has reference to the release. Was it conditional, or was it absolute, so as to bind the plaintiffs, who were non-assenting creditors? This question is distinct, and ought to be considered apart from that of inequality. Now, without repeating the Lord Chief Baron's reasons, I think with him that this release was unconditional. The deed is entered into with all the creditors. Every one of them is in terms a party to it. It is true that the first recital describes the debtor as indebted to the "said several creditors in the several sums of money set opposite to their several and respective names in the schedule hereunto written," and this clause is followed by a clause stating it to have been agreed by a majority in number and value of "the said several creditors" to accept a certain composition. The contention on the part of the plaintiff is, that these words, "said several creditors," must mean the creditors named in the schedule, and referred to in the immediately preceding recital. But I do not agree with that proposition. Primâ facie, no doubt the words would apply to the antecedent next before them; but we may look at the rest of the deed, and, if necessary, apply the words, not to the antecedent next before them, but to the one next before that. This view of the construction to be put on a deed is supported by the decision in the House of Lords in *The Eastern Counties Railway Company* v. *Marriage*. (1) The other parts of this deed have been fully referred to by the Lord Chief Baron, and they all shew in what sense it was intended, viz. as a deed entered into by the debtor for the benefit of all his creditors. As to the second objection, that the deed, assuming it to contain an absolute release, is void for inequality, I am unable to see that it is unequal. The intention of the debtor is to give the same composition to all his creditors equally, whether they assent to the deed or not.

PIGOTT, B. I am of the same opinion. The deed is expressed to be made between the debtor and all his creditors. Then looking at the form of the covenant and at the release, we find that the covenants to pay the composition are with all the creditors, and that they all join in the release. In spite of some grammatical

(1) 9 H. L. C. 32. 7 Jur. N. S. 53.

1866

TETLEY v. WANLESS.

criticisms that might be made on it, I think this is the fair interpretation of the deed, and that being so, it contains an absolute release, and no tender of the composition or notes to the plaintiffs was necessary. Upon the question of inequality I concur with the rest of the Court.

Rule discharged.

Attorney for plaintiffs: *R. Walthew, agent for Wood and Killick, Bradford.*

Attorneys for defendant: *T. M. & M. Howe, agents for Eglinton, Sunderland.*

Nov. 17.

WARBURTON *v.* THE GREAT WESTERN RAILWAY COMPANY.

Negligence—Master and Servant—Fellow Servant—Common Control.

The plaintiff was a porter in the employment of the L. & N. W. R. Co. at their Manchester station. The defendants also used that station, and their servants whilst within the station were subject to the rules of the L. & N. W. R. Co., and to the control of their station-master. The plaintiff, whilst engaged in his usual employment in the station, was injured by the negligence of the defendants' engine-driver, in shunting a train without signal:—

Held, that the plaintiff and the defendants' engine-driver were not fellow servants.

ACTION by a porter in the employment of the London & North Western Railway Company, at their Manchester station, against the Great Western Railway Company, for injuries caused by the negligence of one of the defendant's servants whilst using that station.

The defendants used the Victoria Station at Manchester, which belongs to the London & North Western Company, under their running powers, and under an agreement with that company. The defendants' servants, whilst managing the defendants' trains within the station, were subject to the station rules of the London & North Western Company, and to the direction of the station-master. On the 4th of July, 1864, the plaintiff was employed in cleaning carriages belonging to the London & North Western Company, which stood on a siding in the station, and which were separated into two divisions for the convenience of passage across the line. One of the

defendants' trains having arrived at the station and discharged its passengers, the engine-driver proceeded to shunt it on to the same siding, but, contrary to the rules of the station, did so without giving any signal to the pointsman, or receiving any from him. The train struck the carriages which were being cleaned, and the plaintiff, who was at the moment passing across the line between the two divisions of carriages, was caught by the buffers of those struck by the defendants' train, and jammed against the buffers of the remaining carriages. For the injuries so caused he brought this action.

The case was tried before Martin, B., at the last Manchester summer assizes, and a verdict was found for the plaintiff for 150*l*.

Nov. 6. *Brett, Q.C.* (*Crompton* with him), moved for a new trial, on the ground that the plaintiff and the defendants' engine-driver were fellow servants, and that the plaintiff ought therefore to have been nonsuited, or a verdict directed for the defendants. The true test of fellow service must be community in that which is the test of service. Now the test of service is subjection to control and direction. In *Sadler* v. *Henlock* (1) this is laid down as the test of whether the person, through whose negligence a plaintiff is injured, is a servant of the defendant, or an independent contractor. Crompton, J., there says: "The test is, whether the defendant retained the power of controlling the work." Again in *Abraham* v. *Reynolds* (2), where the plaintiff was held not to be a servant of the defendant, and therefore entitled to sue the defendant for his servant's negligence, Watson, B., says: "They are persons doing work for a common object, but not under the same control, or by the same orders." The test, then, of fellow service is, not the doing work for a common object, or being engaged in a common work. Neither is it the being paid by the same person, as is shewn by the case of *Degg* v. *Midland Railway Company* (3), for there the volunteer, who was paid nothing, was considered as on the same footing as the defendants' paid servants. But it is the working subject to a common direction and control, and such was the case here; both

(1) 4 E. & B. 570, at p. 578; 24 L. J. (Q.B.) 138. (2) 5 H. & N. 143, at p. 149.
(3) 1 H. & N. 773; 26 L. J. (Ex.) 171.

1866

WARBURTON v. GREAT WESTERN RAILWAY CO.

the plaintiff and the defendants' servants were bound to work according to the regulations of the London & North Western Company, and under the control of their station-master, and they are therefore in the position of fellow servants. He also cited *Murphy* v. *Caralli*. (1)

[CHANNELL, B., referred to *Morgan* v. *Vale of Neath Railway Company*. (2)]

Cur. adv. vult.

Nov. 17. The judgment of the Court (Kelly, C.B., Martin, Channell, and Pigott, BB., was delivered by

KELLY, C.B. This was an action tried before Martin, B., in which the verdict was for the plaintiff; and a motion was made before my Brothers Martin, Channell, and Pigott, and myself, for a new trial.

The action was for negligence by the servant of the defendants, whereby the plaintiff sustained injury. The plaintiff was a servant in the employ of the London & North Western Railway Company, and was at work at the Victoria Station, in Manchester, when an engine-driver in the employ of the defendants, the Great Western Railway Company, having entered the station, shunted a train belonging to the defendants from one part of the station to another, and in so doing was guilty of the negligence complained of. The station was the property of the London & North Western Railway Company, and was used in common by the plaintiff's employers, and the defendants, and other companies. By an arrangement between these companies, the defendants' engine-driver ought to have awaited a signal from an officer of the London & North Western Railway Company before he shunted the train into the siding; but without doing so, and without any signal at all, he shunted the train, and negligently caused the injury in question to the plaintiff. The defendants were no doubt primâ facie liable for the negligence of their servant, but it was contended that under the circumstances before mentioned, the plaintiff and the engine-driver must be taken to have been servants engaged under one master, in one common employment, and that therefore, upon the authority of several cases lately decided,

(1) 3 H. & C. 462. 10 Jur. N. S. 1207

(2) Law Rep. 1 Q. B. 149. 5 B. & S. 736.

1866

WARBURTON v. GREAT WESTERN RAILWAY CO.

the defendants were not liable for the act of their servant. The principle, or rather the proposition, of law established by these cases is, that where two or more persons are the servants of one master, and engaged in one common employment, the master is not liable to an action for any injury sustained by one servant by reason of the negligence of another, in the work or employment which is common to both, or incidental to the carrying on of the general business, or the operations in which the one and the other are engaged. And the ground upon which these decisions have been pronounced is, that it must be presumed that a servant takes upon himself the risk of any injury he may sustain by the negligence of another servant, under the same master and in the same employment, and that such risk is part of the consideration for the wages which he is entitled to receive. This proposition, to the extent to which I have stated it, and which is to be deduced from the case of *Morgan* v. *Vale of Neath Railway Company* (1), and many other authorities, has now become established law. But we are of opinion that, inasmuch as the injury sustained by the plaintiff was occasioned by the servant of the defendants, not in the course of any common employment or operation under the same master, but by negligence in the discharge of his ordinary duty to the defendants alone, this case is distinguishable from all which have been decided in relation to the above doctrine of exemption, and that therefore this action is maintainable.

Rule refused. (2)

Attorneys for defendants: *Maples & Co.*

(1) Law Rep. 1 Q. B. 149. 5 B. & S. 736.

(2) On the same day, *Brett*, Q.C., asked leave to appeal, offering to pay the whole damages at once, but the Court refused the application.

Nov. 22.

HANDLEY *v.* FRANCHI.

Practice—Bail Bond—Sufficiency of Affidavit of Debt.

An affidavit of debt, whereon a judge's order holding a defendant to bail was founded, stated simply that the defendant "was well and truly indebted" to the plaintiff, "for money lent and goods sold and delivered," without averring either that the money was lent or that the goods were sold and delivered by the plaintiff to the defendant:—

Held, insufficient.

Garth, Q.C., obtained a rule in this case, calling on the plaintiff to shew cause why a certain bail bond, delivered to the sheriff of Middlesex, should not be delivered up to be cancelled, and why the plaintiff should not pay to the defendant the costs occasioned by the arrest and of this application, upon the ground of the insufficiency of the affidavit upon which the judge's order, holding the defendant to bail, had been made. The affidavit of the plaintiff, as far as regarded the statement of the debt between the parties was as follows:—"The above-named defendant is well and truly indebted to me in the sum of 182*l.* 2*s.*, for money lent and goods sold and delivered." It did not state that the money was lent and the goods sold and delivered *by the plaintiff to the defendant.* On the motion, *Taylor* v. *Forbes* (1) was relied on.

C. P. Butt shewed cause, and contended that the statement of the debt sued for in the action was sufficient. In *Moultby* v. *Richardson* (2) an affidavit that the defendant was indebted to the plaintiff in a certain sum, "as he computes it," was held enough; and the same was held in *Tyler* v. *Campbell* (3), of an affidavit alleging the defendant to be indebted to the plaintiff "in the balance of an account stated," without adding "and settled between them."

Garth, Q.C., in support of the rule, was not called upon.

Kelly, C.B. I am of opinion that this rule should be made absolute. If we were to sanction laxity, to the extent which exists in the present case, in affidavits the effect of which is to deprive the subject of his liberty, it would soon be considered sufficient for

(1) 11 East, 315. (2) 2 Burr. 1032. (3) 3 Bing. N.C. 675.

one person simply to make oath, in general terms, that another was indebted to him, in order to cause the debtor to be arrested. I think, however, that enough must be shewn on the face of an affidavit to hold a person to bail, to afford ground for an indictment for perjury, if it should turn out that no such cause of action existed as that sworn to.

CHANNELL, B. I am of the same opinion. This affidavit would certainly have been defective under the old law, and we ought not to extend the rules respecting such affidavits now that arrest on mesne process is abolished.

PIGOTT, B. In deference to my learned Brothers, I agree that this rule should be ~~discharged~~ made absolute; but my own opinion is rather that the words "indebted to me," sufficiently shewed that money had been lent by the plaintiff to the defendant.

Attorneys for plaintiff: *Pritchard & Sons.*
Attorney for defendant: *B. Lumley.*

ROGERS *v.* ROBERTS.

Nov. 24.

Execution—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 198.

After the sheriff had seized under a writ of fi. fa., the execution debtor executed a deed under the Bankruptcy Act, 1861, which was duly registered and gazetted. On an application by the debtor to the Court, the sheriff was, under s. 198 of the act, directed to withdraw.

Marks v. *Hall* (Law Rep. 2 Q. B. 31) followed.

THE plaintiff having recovered judgment, issued a fi. fa. against the defendant's goods. After the sheriff had seized under the writ, a deed was executed by the defendant under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), which was duly registered and gazetted; and the defendant, relying on the provisions of s. 198 (1), applied to Martin, B., at Chambers, to direct the sheriff to withdraw. The learned judge made the order, giving the creditor leave to apply to the Court.

(1) Section 198 enacts, that the certificate of the filing and registration of the deed under the hand of the chief registrar, and the seal of the court, shall be available to the debtor for all purposes as a protection in bankruptcy.

1866

ROGERS v. ROBERTS.

Crompton Hutton now moved to rescind that order.

[MARTIN, B., referred to a case of *Marks* v. *Hall* (1), decided the day previous in the Queen's Bench.]

The writ there was a ca. sa., here it is a fi. fa.

KELLY, C.B. The order of my Brother Martin was quite correct, and in strict conformity with the words of the act of parliament. It is not disputed that, if the process were against the person of the debtor, the Court would clearly be bound to discharge him out of custody, and so prevent the process from being "available." The case of *Baerselman* v. *Langlands* in this Court (2) and *Marks* v. *Hall* (1) in the Court of Queen's Bench are decisive. It must, then, be sought to distinguish between the case of process against the person, and process against the property; but the words of s. 198 relating to the two are absolutely identical, and there is no ground whatever for the distinction.

MARTIN, B. I am of the same opinion. The real question is, what is the meaning of the word "available," and this admits of no reasonable doubt. The policy of the old law was rather to succour the diligent creditor; the new law aims more at protecting the general mass of creditors, and providing for an equal distribution of the assets. It is difficult to provide fairly for these conflicting interests; but at present we are only called upon to declare the law as it stands, and there can be no doubt that the meaning given to the word "available" by the Queen's Bench is right.

BRAMWELL and PIGOTT, BB., concurred.

Rule refused.

Attorneys for plaintiff: *Chester & Urquhart.*

(1) Law Rep. 2 Q. B. 31. (2) 3 H. & C. 433; 34 L. J. (Ex.) 3.

LEWIS AND OTHERS *v.* M'KEE. *Nov.* 14.

Shipping—Bill of Lading, indorsement of—Discharge of indorser from liability—Acquiescence and Waiver.

The consignee of goods, before the arrival of the ship, indorsed over the bill of lading, but not so as to pass the property in the goods, to wharfingers in these words: "Deliver to W. & K. or order, looking to them for all freight, dead freight, and demurrage, without recourse to us." The plaintiffs, the shipowners, accepted the indorsement, and in pursuance of it delivered the goods to W. & K. :—

Held, that the shipowners were not entitled to sue the consignee for freight.

DECLARATION by shipowners for freight for goods shipped for Falmouth, on the plaintiffs' ship, under a bill of lading signed for the same by the master of the ship, as agent for the plaintiffs, and to be there delivered as ordered (the act of God, &c.,) unto the defendant or to his assigns, on his or their paying freight for the goods as per charterparty, with primage and average accustomed; Averments, that thereupon, and by reason thereof, the property in the goods passed to the defendant, that by the charterparty referred to in the bill of lading, freight was made payable in cash at certain rates therein specified, and that all conditions precedent had been performed. Breach, that although the defendant paid the plaintiffs a portion of the freight, &c., yet he made default in paying the residue amounting to the sum of 67*l.*

Third plea, that by the charterparty it was provided that the plaintiffs should deliver the goods on being paid freight by the receivers of the cargo; that before the ship arrived at the port of call, and before the time had arrived for the delivery of the cargo, the defendant indorsed the bill of lading to certain persons carrying on their business under the firm and style of Messrs. Whatney & Keane, in the words following: "Deliver to Messrs. Whatney & Keane or order, looking to them for all freight, dead freight and demurrage, without recourse to us, (signed) George B. McKee & Co.," and that the plaintiffs accepted the indorsement, and delivered the goods in pursuance thereof to Whatney & Keane, as the persons entitled to the goods, and not to the defendant.

Demurrer and joinder.

1866

LEWIS v. M'KEE.

Karslake, Q.C. (*Butt* with him), in support of the demurrer. The plea appears to be framed on the Bills of Lading Act (18 & 19 Vict. c. 111), which reversed the effect of *Thompson* v. *Dominy* (1), and gave to the indorsement of a bill of lading the effect of transferring the contract. If it alleged that the defendant before the arrival of the goods, indorsed the bill of lading for valuable consideration, and thereby passed the property in the goods to the indorsee, as was done in *Smurthwaite* v. *Wilkins* (2), the plea might possibly on the authority of that case be held good, although the defendant is here the original consignee of the goods; but it avoids stating this.

[*Watkin Williams*, for the defendant, intimated that he should rely upon the special matters in the plea, and that it might be assumed that Whatney & Keane were the defendant's wharfingers, and that the indorsement was only intended to make them receivers.]

If it is admitted that the property did not pass, and that the defendant is not protected by the act, he can only answer the plaintiffs' claim by shewing a mutual agreement, by which the shipowners consented to take the responsibility of a third person in place of that of the defendant. To do this, the plea must state facts, not only consistent with such an agreement, but inconsistent with any other supposition. But the plea, which admits the defendant's liability, does not even say that by the acceptance of the indorsement and the delivery there was a discharge of that liability, but at the utmost only states facts from which a jury might infer a discharge. The indorsement cannot limit the rights of the shipowners; for the shipowners, who are entitled to have some person named to them to whom they may deliver the goods, are at liberty to accept that part of the indorsement, and reject the residue. By doing so and delivering the goods accordingly, they lose their lien, but their act is no evidence of an exoneration of the defendant. This view is in accordance with *Shepard* v. *De Bernales* (3), followed by *Domett* v. *Beckford* (4), and other cases, where it was held that the words "he or they paying freight for the said goods" in a bill

(1) 14 M. & W. 403.

(2) 11 C. B. (N.S.) 842; 31 L. J. (C.P.) 214.

(3) 13 East, 565; Abbott on Shipping (9th ed.) p. 340.

(4) 5 B. & Ad. 521.

1866

LEWIS v. M'KEE.

of lading, did not on a delivery without payment exonerate the shipper from his liability.

[BRAMWELL, B. Suppose the indorsement to have directed the shipowners to deliver conditionally on the payment of freight, and not otherwise, and unless freight were paid not to deliver.]

It would still be a question for the jury whether the defendant was discharged by the delivery.

Watkin Williams, in support of the plea. (1) The liability of the defendant in this action is founded on the Bills of Lading Act, the intention of which was to transfer the liability, but not to make two persons liable; but the effect of the plaintiffs' contention would be to retain the indorser's liability, in addition to that of the shipper and of Whatney & Keane. But the plea shews an answer. First, it states that by the terms of the charterparty, the plaintiffs were to deliver the goods on being paid freight by the receivers of the cargo; and though this may not exonerate the shipper, it is a good answer for the defendant, who is neither shipper nor receiver of the cargo. Secondly, it is a fallacy to say that the plea admits a liability in the defendant; his liability, which is created by the act, is only an inchoate one, which attaches only on the arrival of the goods, and which may never attach, by reason of his indorsing the bill of lading so as to pass the property (as is admitted), or by reason of the freight not being earned; the defendant's contention is, that this liability has never attached, by reason of his indorsement of the bill before the arrival of the goods. Thirdly, the special indorsement directs a delivery to Whatney & Keane, "looking to them for all freight, dead freight, and damages, *without recourse to us*." The plea, stating a delivery to them, shews that they have accepted the indorsement, and have therefore made themselves liable, and also shews that the plaintiffs have accepted the terms of the indorsement. That the plaintiffs were not bound to accept this indorsement, proves that by accepting and acting upon it they have consented to be bound by its terms, and to relinquish their claim on the defendant, taking the substituted liability of Whatney & Keane; for it is impos-

(1) The declaration including primage and average, as well as freight, *Williams* offered to amend the plea by limiting it to the freight, which the Court permitted.

1866

LEWIS v. M'KEE.

sible to treat these words as inserted in the indorsement for the benefit of the master, which was the ground of decision in the cases of *Shepard* v. *De Bernales* (1) and *Domett* v. *Beckford*. (2) They might have refused to act upon it, and held the defendant liable for not accepting the goods; but they cannot put the goods out of his power, and make them subject to the wharfinger's rights against him, and still claim payment from him, contrary to the terms of the order. It is in accordance with the spirit and intention of the Bills of Lading Act to make bills of lading as negotiable as possible, and that object is pursued by upholding such a plea as the present one. Fourthly, the plea may be taken as a denial of the performance of a condition precedent; the goods are to be delivered as ordered, but the terms of the order will not have been pursued if the defendant succeeds.

Karslake, Q.C., in reply.

KELLY, C.B. I can entertain no doubt as to what our decision ought to be in this case. The action is brought against the original consignee under a bill of lading, and originally, upon the facts stated, the defendant was contingently, though not absolutely and in all events, liable to the payment of freight. I say contingently, because the consignment and the bill of lading might have been assigned so as to prevent any claim from being made against him. But in this state of circumstances the defendant indorses the bill of lading to Whatney & Keane, with the words, "looking to them for all freight, dead freight, and demurrage, without recourse to us." The plea, after stating these facts, then alleges that the plaintiffs accepted the indorsement, and in pursuance of it delivered the goods to Whatney & Keane. Now I quite agree that if this statement of facts only raised a case for the consideration of a jury, a case on which the presiding judge ought to take their opinion, the plea would be insufficient. A state of circumstances which is pleaded as a defence in law, must be stated in definite terms, and in such a manner as to shew clearly the legal consequence. But I am of opinion that if the consignee of goods indorses over the bill of lading, and gives notice to the shipowner or the party entitled to freight, and in the indorsement states in

(1) 13 East, 565. (2) 5 B. & Ad. 521.

express terms that the shipowner or party entitled to freight is to look to the indorsee without recourse to him, and that indorsement is accepted and acted upon without objection or qualification, that acceptance constitutes a defence to any action at law by the shipowner against the indorser. The statement of facts is, therefore, in itself an answer to the plaintiffs' claim, and not merely a statement which might be used to raise an inference of a discharge by the plaintiffs of the defendant.

1866
LEWIS v. M'KEE.

BRAMWELL, B. I am of the same opinion. The plea setting out the actual facts of the case, the demurrer raises the question whether it only states facts for the consideration of the jury, or shews a conclusive answer in law. On the ground stated by the Chief Baron, I am of opinion that it shews an answer in law, and I will only add this:—The indorsement of the bill of lading, as stated in the plea, is equivalent to saying, "Deliver to W. & K. on these terms or do not deliver at all." If so, the owners of the freight might have said, "We will not deliver to W. & K. at all: we don't choose to take their responsibility;" and they would have had a right of action against the defendant for not receiving the goods. But this mode of indorsement seems to me a very reasonable thing; how else is the owner of the goods to act if he wishes to transfer them to the custody of a wharfinger or warehouseman, who is to be solely liable for the freight to the shipowner, and with whom alone he is to be accountable, and entitled and subject to legal rights and liabilities? The shipowner may refuse to accept the substituted liability, but if after examination he takes the order, he must take it on the terms of exonerating the indorser from liability.

CHANNELL, B. I am of the same opinion. In determining whether this plea shews a good legal answer to the plaintiffs' demand, it is not sufficient to say that the facts stated in it are such as to justify, as a matter of evidence, the inference that the plaintiffs discharged the defendant from liability, but the question is, whether they *require* that inference. The plaintiffs might have refused to accept the special indorsement; but if the plea shews that they have delivered according to it, it shews a renunciation

1866

LEWIS v. M'KEE.

by them of their right to hold the defendant responsible. Now, after stating the indorsement, the plea goes on to say that the plaintiffs accepted the indorsement, and delivered the goods in pursuance of it to W. & K., "as the persons entitled to the said goods, and not to the defendant." It therefore excludes the assumption of a delivery to those persons as mere agents of the defendant. On these grounds I am of opinion that the plea shews a good answer to the declaration.

PIGOTT, B. If the facts stated in the plea were only evidence from which there might or might not have been inferred a discharge of the defendant by the plaintiffs, the plea would have been insufficient; but on the grounds stated by my Lord and my learned Brothers, I think the plea good.

Judgment for the defendant.

Attorneys for plaintiffs: *Pritchard & Sons.*
Attorneys for defendant: *Cotterills.*

Nov. 22.

THOMPSON AND ANOTHER *v.* KNIGHT.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Deed of Arrangement—Inequality—Trustees' discretion.*

Por 408
40B. 52.
5 Ch 334.

A deed of arrangement entered into under the Bankruptcy Act, 1861, s. 192, between a debtor, his creditors, and a trustee, provided that the creditors should be paid their composition by instalments at two, four and six months from the date of the deed. It also contained a clause conferring on the trustee a discretionary power to pay to all creditors whose debts did not exceed 20*l.* the full amount of their composition in one sum at such time or times as he should think fit:—

Held, that this clause made the deed unequal.

DECLARATION. First count, that the defendant by his order, directed to Messrs. Harris & Co., required them to pay to the plaintiffs or bearer 73*l.* 17s.: that the order was duly presented for payment and was dishonoured, whereof the defendant had notice but did not pay the same.

Second count, for money payable for goods sold and delivered, and for money found to be due on an account stated.

Plea, setting out a composition deed entered into after the accruing

of the plaintiffs' claim, under s. 192 of the Bankruptcy Act, 1861, between the defendant (the debtor) of the first part, the creditors of the defendant of the second part, and one Edwin Thomas Bartlett, (a trustee) of the third part; whereby after reciting that the requisite majority of the creditors had agreed to accept a composition of 10*s.* in the pound, to be paid by three equal instalments payable respectively at the end of two, four, and six months from the date thereof; and that the debtor should deliver to the creditors respectively his promissory notes for the amount of the instalments, to be dated on the day of the date of the deed, and to be payable at two, four, and six months date, and should secure the payment of the notes by depositing a weekly sum of 40*l.* in a certain bank to the credit of the account of Edwin Thomas Bartlett, trustee for the creditors of the debtor, until enough had been paid to the credit of such account to satisfy the amount of the composition and all costs, &c., incurred by the trustee in carrying the deed into effect; and after further reciting that the defendant had, previously to the execution thereof, delivered to the creditors respectively the promissory notes for the amount of the instalments of their respective debts; the debtor covenanted to pay the sum of 40*l.* weekly to the credit of the account of the trustee until enough had been so paid to satisfy the aggregate amount of the composition, upon trust to provide for the promissory notes given by the debtor to his creditors when they should become due, and to pay all the creditors their composition of 10*s.* in the pound. And it was amongst other things provided by the deed that "in cases where the amount of composition payable to any creditor shall not exceed 10*l.* (*i. e.* where the amount of the creditor's debt shall not exceed 20*l.*), the said Edwin Thomas Bartlett, his executors, &c., shall be at liberty, if he or they shall so think fit, to pay the same in one sum at such time or times as he or they shall think fit." The plea then averred the performance of all the statutory conditions necessary to make the deed binding on the plaintiffs in the same manner as if they had been parties thereto and had executed the same.

Demurrer and joinder.

H. T. Cole, in support of the demurrer, contended that the deed was unequal because the trustee had a discretionary power of paying

1866

THOMPSON v. KNIGHT.

off creditors not exceeding 20*l.* their whole composition of 10*s.* in the pound at once, whilst all the other creditors had to wait two months for the first instalment of their composition. In *Leigh* v. *Pendlebury* (1), a proviso empowering the trustee to pay in full those creditors whose debts were under 10*l.* was held unreasonable.

R. E. Turner, contrà. *Leigh* v. *Pendlebury* (1) is distinguishable. There, certain creditors were to be paid *in full*. Here, the creditors under 20*l.* are to receive the same composition, viz. 10*s.* in the pound, as the rest. The only discretion of the trustee is as to the time of payment, as to which it is reasonable he should be able to use his own judgment. In *Coles* v. *Turner* (2), a discretion to trustees under a deed of assignment to determine the amount of dividends, and to pay them in such place and manner as might be thought fit, was held reasonable. Again, it does not appear that there are any creditors in existence of the privileged class, but assuming that there are some of that class, the inequality created by the clause giving this discretion to the trustee, is not so *substantial* as to vitiate the deed: *Keyes* v. *Elkins*. (3)

H. T. Cole was not called on to reply.

KELLY, C.B. I am of opinion that this deed cannot be supported as a deed of arrangement under the provisions of s. 192 of the Bankruptcy Act, 1861. There are no doubt a great number of these deeds executed daily, and daily forming the subject of discussion, and it is therefore necessary to state clearly the principle on which they are to be held valid or invalid. Now I think it absolutely essential that all the creditors should be placed on an equal footing, especially when I remember that, generally, a great number of them are in these cases bound by an instrument to which they are not parties and to which they have not assented. Under such circumstances, it is only when the provisions of the deed are just and equal that the deed ought to be held binding upon all; but here there is a provision that, where the amount of composition payable to any creditor shall not exceed 10*l.*, the trustee may pay that amount, in one sum, at such time or times as he

(1) 15 C. B. (N.S.) 815; 33 L. J. (C.P.) 172.
(2) Law Rep. 1 C. P. 373.
(3) 34 L. J. (Q.B.) 25.

1866

THOMPSON v. KNIGHT.

may think fit. It does not appear how many creditors of this class there may be, but the insertion of the provision, which would otherwise have been idle, gives us a right to assume that there are some. But without making any assumption, here is a power given to pay a certain class of creditors a half of their respective debts, by that payment the whole fund might possibly be exhausted, so that no other creditor could be paid at all. It would be absurd to say under these circumstances that the creditors are in an equal position. Very possibly where there are a number of small debts, and where the debtor and his surety are persons of substance, no harm would happen to any of the creditors, and practically it might be very beneficial that the trustee should pay off the smaller creditors in full. Still that would depend on the amount of the assets and debts and the number of creditors who would have to be paid in full. I am therefore of opinion that this condition is unreasonable, and that the deed is invalid.

CHANNELL, B. I am also of opinion that the plea is bad. It is clear that if the deed is acted upon, and its provisions carried out, some inequality may arise. Suppose that the deed had provided absolutely that the stipulated composition should be paid to one class of creditors in three instalments, and to another class in one, that would certainly have been an inequality. This deed does not exactly provide that, because here the trustee has a discretionary power left to him. But this circumstance does not, in my judgment, prevent the objection made from prevailing. The case of *Keyes* v. *Elkins* (1), which has been referred to, does not really affect the question. The great question there was, whether a particular clause was a release, or only a covenant not to sue, and it was objected that, assuming the clause to be a release in terms, it could not so operate in effect, because there was a reservation of the rights of a certain class of creditors. The Court, however, held that it might still so operate, and Cockburn, C.J., says (2):—"The only way the objection could prevail would be by reason of producing inequality among the creditors," thus stating the objection as it has been stated here. Then, he adds, there must be a "*substantial*" inequality; and in that case I can well understand

(1) 34 L. J. (Q.B.) 25. (2) 34 L. J. (Q.B.) at p. 29.

1866

THOMPSON v. KNIGHT.

that there was no substantial inequality; but here I think that there is, and accordingly my judgment is for the plaintiffs.

PIGOTT, B., concurred.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Torr, Janeway, & Tagart.*
Attorneys for defendant: *Surr & Gribble.*

Nov. 21.

CHRISTIE *v.* THE COMMISSIONERS OF INLAND REVENUE.

Stamp Act (13 & 14 *Vict. c.* 97) *Sch. Tit.* "*Conveyance*"—*Conveyance upon sale of Property—Dissolution of Partnership—Conveyance by retiring Partner to Co-partner.*

Post 394

A dissolution of partnership being in contemplation between two persons, one of whom was desirous of retiring from business, a deed was entered into, whereby after reciting an agreement for dissolution and that the property of the firm and the share due to the retiring partner had been ascertained, that in respect of such share a specified sum had been paid in cash, and that the remainder was to be secured by a mortgage, and by assignment of certain policies of insurance, it was witnessed that the partnership was dissolved, and that the retiring partner should forthwith release to the remaining partner all his estate in the partnership property, real or personal, and obtain the concurrence in the conveyance of all necessary parties. By an indenture of later date, reciting the previous deed, the retiring partner, "in pursuance of the agreement and in consideration of the premises," conveyed to the remaining partner all his estate and interest in the partnership property and assets:—

Held, that the indenture was liable to ad valorem stamp duty, as a "conveyance upon the sale of property," within the meaning of 13 & 14 Vict. c. 97, sch. tit. "Conveyance."

CASE stated pursuant to 13 & 14 Vict. c. 97, by the Commissioners of Inland Revenue, to enable Charles Peter Christie to appeal against their decision as to the stamp duty chargeable on the indenture hereafter mentioned.

The indenture, dated the 21st of March, 1866, was made between John Back of the first part, Robert Hunt of the second part, Philip Longmore and Matthew Skinner Longmore of the third part, and Charles Peter Christie of the fourth part. It appeared from the recitals, that Messrs. Back and Christie had dissolved a partnership in the trade of brewers and wine merchants previously existing

between them as from the 29th of September, 1865; and that by a deed, dated the 20th of March, 1866, made between them—after reciting that a stock account and balance-sheet of the partnership up to the 29th of September, 1864, had been taken and made and duly signed by the partners, shewing all the freehold, copyhold, and leasehold and other property, and also the debts and credits of the partnership, the amount of profits up to the 29th of September, 1864, and the respective shares of the partners and the loans of each of them to the firm; that, in June, 1865, John Back being desirous of retiring from the firm, the presumed amount due to him on the 29th of September following was ascertained, and appeared to be 110,000*l.*; that he had proposed to retire as from the last-mentioned date upon the conditions that he should be paid 10,000*l.* by Charles Peter Christie in cash, and have the remainder of the 110,000*l.* found to be due to him secured by Charles Peter Christie by a mortgage of part of the assets of the firm, and by the assignment of certain policies of insurance; that Charles Peter Christie had agreed to a dissolution of partnership on these conditions; that he had paid to John Back 10,000*l.* in cash, and that the terms of a mortgage of part of the assets of the firm and of the assignment of the policies had been finally arranged; and that it was intended that such mortgage should be executed by Charles Peter Christie as soon as John Back and certain other persons who were trustees of a portion of the property to be comprised in the mortgage should have conveyed the same to him—it had been witnessed, 1st, that the partnership was dissolved as from the 29th of September, 1865; 2ndly, that John Back should forthwith release to Charles Peter Christie all his estate and interest in the freehold, copyhold, and leasehold estates, stock in trade, &c., belonging to the late co-partnership; 3rdly, that the concurrence in the conveyance of the trustees of certain portions of the property should be obtained; 4thly, that Charles Peter Christie should, within seven days from the date of the deed in recital, or as soon after as might be, execute a mortgage on the terms arranged; 5thly, that Charles Peter Christie should indemnify John Back against the debts and liabilities of the firm. After further reciting that the assets of the partnership consisted, amongst other things, of certain freehold and copyhold lands and

1866

CHRISTIE v. COMMISSIONERS OF INLAND REVENUE.

hereditaments and leaseholds, and that some of them were vested in Philip Longmore and Matthew Skinner Longmore, being the executors of Peter Christie, a deceased partner, and in Robert Hunt, a retired partner, the indenture witnessed that, in pursuance of the agreement, and in consideration of the premises, John Back, Robert Hunt, Philip Longmore, and Matthew Longmore, according to their several interests and estates, granted and released, remised and quitted claim, and assigned to Charles Peter Christie all the freehold, copyhold, and leasehold property in the schedules to the indenture underwritten, then forming part of the assets of the firm, to hold to the use of him, his heirs, &c., for ever.

The indenture contained the usual covenants for title by John Back, Robert Hunt, Philip Longmore, and Matthew Longmore, and, as to the leaseholds, by Charles Peter Christie to pay rent and perform the covenants in the leases. The schedules annexed to it contained a detailed description of the property comprised in the conveyance.

Charles Peter Christie presented this indenture to the Commissioners of Inland Revenue, under the provisions of 13 & 14 Vict. c. 97, s. 14, and desired their opinion as to the stamp duty with which it was chargeable. He submitted that the transaction evidenced by it was not a "conveyance upon the sale" of property within the meaning of the schedule of that act, and that the indenture was therefore only chargeable with a duty of 1*l.* 15*s.* (besides progressive duty) as on a deed not otherwise charged by any act or acts. The Commissioners were of opinion that the indenture was chargeable under 13 & 14 Vict. c. 97 (and 28 & 29 Vict. c. 96, s. 1, which altered the amount of duty), as a "conveyance upon the sale" of property, with an ad valorem duty of 5*s.* in every 50*l.* in respect of the purchase or consideration money therein expressed, and accordingly assessed the stamp duty on it at 550*l.* 10*s.* (besides progressive duty), whereupon Charles Peter Christie paid that sum to them, but having declared himself dissatisfied with their decision, required them to state this case. The question for the opinion of the Court was, whether the indenture of conveyance of the 21st of March, 1866, was chargeable with ad valorem conveyance duty in respect of the sum of 110,000*l.* therein mentioned, or on any other, and what sum.

Joshua Williams, Q.C. (*Jolliffe* with him), for the appellant. This transaction is not a conveyance "upon the sale" of property within the schedule, tit. "Conveyance," of 13 & 14 Vict. c. 97 (1), which contains no express terms applicable to it. Without "clear words" a revenue act cannot impose a duty on the subject: per Pollock, C.B., in *Marquis of Chandos* v. *Commissioners of Inland Revenue*. (2) It is an arrangement between Messrs. Back and Christie to facilitate a dissolution of partnership. The retiring partner receives the share of profits due to him on a balance of account, and also is repaid moneys advanced by him to the firm. In return he executes a conveyance, passing out of himself partnership assets to which he is no longer entitled. The contract of partnership involves an implied stipulation, that the property belonging to the partners shall be sold and divided upon the dissolution. Each partner has a right to have the property realised, and to be paid his share: per Kindersley, V.C., in *Darby* v. *Darby* (3); and when a retiring partner, on receiving that share, executes a deed assigning his interest to his co-partner, there is nothing *sold* by him in the ordinary acceptation of the word: *Belcher* v. *Sikes* (4); 2 Lindley on Partnership, 713. The case is similar to that of a partition: *Henniker* v. *Henniker* (5); or of a family arrangement; neither of which, although money often passes between the parties, are liable to ad valorem duty as sales: *Denn* d. *Manifold* v. *Diamond* (6); *Blandy* v. *Herbert* (7); *Massy* v. *Nanney*. (8) In *Potter* v. *Commissioners of Inland Revenue* (9), an assignment by deed by one partner to another of the goodwill of a trade was held to be a

(1) The title imposes a certain specified duty (altered in amount by 28 & 29 Vict. c. 96, s. 1) upon a "conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, *upon the sale* of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim in, to, out of, or upon, any lands, tenements, rents, annuities, or other property; that is to say, for and in respect of the principal, or only deed, instrument, or writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons by his, her, or their direction."

(2) 6 Ex. at p. 479.

(3) 3 Drew. at p. 505. 1 Jur. N.S. 273.

(4) 6 B. & C. 234.

(5) 1 E. & B. 54. 17 Jur. 436.

(6) 4 B. & C. 243.

(7) 9 B. & C. 396.

(8) 3 Bing. N. C. 473.

(9) 10 Ex. 147. 1 Jur. N.S. 778

1866

CHRISTIE v. COMMISSIONERS OF INLAND REVENUE.

conveyance "upon the sale of property;" but there the parties made an *express* bargain and sale, and precluded themselves from contending that the transaction was anything but a sale. *The Furness Railway Company* v. *Commissioners of Inland Revenue* (1) is distinguishable on the same ground.

The Attorney General (*Crompton Hutton* with him), was not called upon for the respondents.

KELLY, C.B. This case has been very ingeniously argued, but I am of opinion that it does not admit of any reasonable doubt. In all these cases, it appears to me, that the substance of the transaction is alone to be considered upon the question whether the instrument is liable to the stamp duty under the statute, and the substance of this transaction collected from the deed certainly seems to me to be a sale by Mr. Back to Mr. Christie of Mr. Back's interest in the partnership property for the sum of 110,000*l*. I can see no distinction with respect to liability to stamp duty between a sale on the part of Mr. Back to Mr. Christie, who happened to be the continuing partner, and a sale by Mr. Back to any other person with whom Mr. Christie might have been disposed to enter into partnership, and to whom Mr. Back might have been willing, for a certain consideration, to assign and convey the whole of his interest in the partnership property. It seems that upon the contemplated retirement of Mr. Back, a balance-sheet was made out which enumerated the whole of the partnership property, and reference was also made in the balance-sheet, which, however, is not before the Court, to some loans by one or the other, or both partners, to the partnership fund. It does not appear what was the amount of any loan, if loan there was, by Mr. Back to the partnership, or whether that money was allowed to remain in the concern, or was paid off, or whether it was taken into consideration in the estimate of the whole of the partnership property, or the interest of Mr. Back in the partnership property, or whether it was dealt with in any other way which might have been thought best between the partners. We cannot, therefore, in this case, upon the terms of this deed, treat it as an element in the consideration of the question. The result, therefore, is that this is simply a sale by Mr. Back to

(1) 33 L. J. (Ex.) 173.

Mr. Christie of his interest in this partnership property for the consideration or sum of 110,000*l*. Now, certain cases have been referred to by Mr. Williams, which he contends either establish a different principle or tend to a different conclusion. He has referred to the well-known case in which partnership property, although it may consist in part, or even wholly, of real estate, is as between the partners upon a dissolution, or any other settlement that may take place between them, dealt with, not as land, but as money. The fact is, that case is only the same as the case of land devised to be sold to be converted into money, where that is assumed to be done which is directed by will to be done, and the property is treated as money. But, on the sale of such a property, who can doubt that the conveyance by which it is sold would be subject to an ad valorem stamp duty in reference to the amount of the consideration for the purchase and sale? Then, again, several cases of family settlement have been referred to, and these, no doubt, have been determined upon a different principle. They have been held to be exempt from stamp duty, but they are cases, looking, as I say we ought to look, to the substance of the transaction, which do not resemble a sale. They are, in fact, merely arrangements between different members of the family. A father, for example, may convey to his son a landed estate worth 20,000*l*. a year, and he may require his son to make a settlement to a daughter or to younger children of a greater or less sum. But that does not, in truth, constitute the consideration at all, far less the price or purchase-money of the estate which the father conveys to the son. It would, therefore, be really to treat the case as something different from what it is in intention and in fact to hold that anything that may pass out of a grantee of property under a family settlement is to be treated as the purchase-money for that which is conveyed to him, and is to be liable to stamp duty. I think, therefore, that each class of cases referred to is distinguishable both in principle and in fact.

It only remains to refer to the third case which has been put to us, namely, the case of a partition. Now, a partition is totally unlike a sale and purchase of a landed estate. Persons who have some interest in property held under a tenancy in common, or in any other joint manner or character, are very frequently content to take

1866

CHRISTIE v. COMMISSIONERS OF INLAND REVENUE.

something far less in value than the interest which they possess in the common property, in order that what they are possessed of they may possess in severalty, independently of all other persons; and where persons come to such an arrangement, whether they agree at once to divide the property into equal portions, or whether one is to pay a sum of money to the other or to all the others, the sum which is paid is not paid as the price or purchase-money of the property which he who pays it takes under the partition. There the real consideration, looking to the substance of the transaction, is the partition itself, and the power which the party in question takes to hold the property in severalty, and independently of those who had heretofore been his fellow-holders.

Under these circumstances it appears to me, looking at this conveyance, that it is a mere ordinary conveyance and sale of a valuable interest in a property which constituted, before the conveyance, the partnership property. The conveyance is made to the continuing partner, but, whether made to him or to any other person, it is for all purposes a sale of the property in question in consideration of the price or purchase-money of 110,000*l*. I am of opinion, therefore, that the respondents are entitled to judgment.

CHANNELL, B. I also think that the respondents are entitled to judgment. We are not called upon in this case to say what would have been the state of things in the case of one partner paying another out, and where there might have been no conveyance. Here there has been a conveyance, and the only question therefore that can arise is, whether it is a "conveyance on the sale" of property within the meaning of the act of parliament. I admit that we are not to endeavour to fix the subject with liability to duty by any strained construction of the act. At the same time, I agree with the Lord Chief Baron that we have to look to the substance of the transaction. And here it appears to me that the bargain between the parties, which has been carried out by this conveyance, is a bargain that the one should sell to the other his interest in the firm, and all the property of the firm, for a certain ascertained sum of 110,000*l*. A part of that was to be secured by mortgage, and the amount was arrived at by a stock account having been taken, but I am unable to see that that

makes any distinction in the case. If one partner, without taking any account, had said to the other: "I will sell all my interest at a sum named," and there had been a conveyance carrying out that arrangement, it is conceded that duty would be payable. All that has been done in this case seems to me to have been to ascertain what would be the fair sum for the one party to receive and for the other to give, so that the retiring partner might relinquish all his interest in the business, and the entire property might vest in the other partner. For these reasons, without adding further to what has been said by the Lord Chief Baron, I think the respondents are entitled to the judgment of the Court.

PIGOTT, B. I am of the same opinion. I quite agree that we must look to the substance of the transaction. Now here, the substance of the transaction is as follows:—Mr. Back wished to retire, and Mr. Christie wished to carry on the whole business. Mr. Back's interest in the property of the concern was ascertained to be worth 110,000*l.* In consideration of Mr. Christie paying him 10,000*l.* in money and, undertaking to give him, in respect of the remaining 100,000*l.*, the security of a mortgage, and also the further security of certain policies of assurance, he conveyed his interest in the property for the amount of 100,000*l.* This appears to me to be substantially a conveyance of property "upon a sale." If this transaction had taken place between a third person, not a member of the firm, and Mr. Back, there would not have been a doubt about the stamp duty being payable, and, in my judgment, the fact of its taking place between Mr. Back and an old member of the firm, makes no difference. I think, therefore, that our judgment must be for the respondents.

Judgment for the respondents.

Attorneys for appellant: *Bower & Cotton.*

Attorney for respondents: *Solicitor to Commissioners of Inland Revenue.*

Nov. 26.

CLAY *v.* OXFORD.

Practice—Parties—Amendment—Dead Plaintiff—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *s.* 222.

Where an action is commenced in the name of a dead man, his representatives cannot be substituted as plaintiffs.

THIS action was commenced on the 10th of May, in the name of John Clay, as plaintiff. It was afterwards discovered that John Clay had died before the date of the writ, and on the 14th of June a summons was taken out to substitute the names of his executrix and executors as plaintiffs. This summons was abandoned; but on the 7th of November another summons to the same effect was taken out before Martin, B., who made the order prayed. It was desired to have the action continued, in order that some depositions which had been taken before the discovery of John Clay's death might be read in the cause.

J. A. Russell, having obtained a rule nisi to rescind this order,

Jones, Q.C., shewed cause. The amendment asked is not beyond what might have been made at common law in cases where, as in this case, a peculiar reason of convenience operates in favour of continuing the existing suit. In *Carne* v. *Malins* (1) plaintiffs were added to save the right of action, and for the same reason in *Brown* v. *Fullerton* (2) the official assignee was added, whose right was, as the right of the applicant is here, a derivative right. But, at least, the Court has power under section 222 of the Common Law Procedure Act, 1852, to make the amendment. The addition of parties in *Blake* v. *Done* (3) was really a substitution, and the same may be said of *La Banca Nazionale* v. *Hamburger* (4), since a corporation is specifically different from a natural person.

J. A. Russell, in support of the rule, was not called upon.

KELLY, C.B. It may, perhaps, be regretted that the Common Law Procedure Act has not authorized the substituting of one

(1) 6 Ex. 803; 20 L. J. (Ex.) 434.
(2) 13 M. & W. 556.
(3) 7 H. & N. 465; 31 L. J. (Ex.) 100.
(4) 2 H. & C. 330.

plaintiff for another, or one defendant for another, in a case like this; but we have no power, either by common law or by statute, to do what is asked. Since the Common Law Procedure Act of 1852, by the 34th and following sections, in express terms enables the Court to add or to strike out any number of plaintiffs, and by the 136th and following sections, gives a similar power of allowing the representatives of a deceased plaintiff to continue the suit, but contains no provisions in any part of it for substituting one plaintiff for another, one suing in a representative capacity for a deceased man who never was a party, I cannot but think that no such power was meant to be given. The rule must, therefore, be made absolute.

BRAMWELL, B. I am of the same opinion. I think such a substitution was not within the intention of the act. This is not a case where it can be said that persons, not formally entitled to be parties, have brought an action to try certain matters perfectly well known to both sides, which is the explanation of *Blake* v. *Done* (1) and *La Banca Nazionale* v. *Hamburger*. (2) But here the plaintiff is altogether wrong, or rather there is no plaintiff; the man in whose name the action was brought was dead. It cannot be said that this is an amendment "necessary for the purpose of determining in the existing suit the real question in controversy between the parties," nor is this an application made between the parties to the suit; for there is no plaintiff, and, therefore, no existing suit, and no question in controversy between the parties. If we could see some person suing who had a beneficial interest in the claim made, though not legally entitled to sue, the case would be within the principle of the authorities cited. But the power of amendment is limited to cases where there was originally a party suing, possessed, though with a variety in legal description, of the same interest with the party to be substituted.

CHANNELL, B. I also think we have no jurisdiction to make this order. The sections previous to section 222 do not affect the question, and the power to amend must be claimed under that section, if at all. That section does not provide in terms for such

(1) 7 H. & N. 465; 31 L. J. (Ex.) 100. (2) 2 H. & C. 330.

1866

CLAY v. OXFORD.

a case, and, as in the earlier sections the subject of the alteration and substitution of parties is discussed with great care and accuracy, and this case is not mentioned, we must infer that the power was not intended to be given.

PIGOTT, B. I was at first disposed to view section 222 as giving us the power to make the amendment; but, on looking more carefully at the act, and considering the specific provisions that are made for the nonjoinder and misjoinder of plaintiffs, I think that, on the true construction of that section, it does not confer that power upon us.

Rule absolute.

Attorneys for applicants: *Uptons, Johnson, & Upton.*
Attorney for defendant: *J. W. Nicholson.*

Nov. 19.

AGRA AND MASTERMAN'S BANK, LIMITED *v.* LEIGHTON.

Bill of Exchange—Failure of Consideration—Satisfaction of Bill—Bills of Exchange Act, 1855 (18 & 19 *Vict. c.* 67)—*Leave to appear and plead—Practice.*

In an action commenced by writ of summons under the Bills of Exchange Act, 1855, leave to appear and plead will be given whenever there is an apparently real defence, and the condition of bringing the money into Court, or finding security, will only be imposed where there is reason to doubt its *bona fides*.

Where, in an action by an indorsee, leave has been given on affidavits shewing a good defence as between the original parties to the bill, and stating circumstances which raise the inference that the plaintiff is not a holder for value, or is for any other reason liable to be opposed by the same defence, affidavits in answer will be received to contradict that inference, and will, if clear and cogent, be ground for rescinding the leave.

In an action by the indorsee of a bill of exchange against the acceptor, a plea stating the satisfaction of the bill by the drawer will not be good unless it shews that the plaintiff is not the lawful holder of the bill.

In such an action a plea stating that the bill was given for goods to be supplied by the drawer, and that only part of the goods were supplied, of which the defendant accepted a part, and that by reason of the non-completion of the contract the part supplied became valueless to him, and also shewing that the plaintiff is not a holder for value, will be good, provided also (per Channell and Pigott, BB.) the value of the goods accepted is shewn to be a definite sum.

THIS was a consolidated action on two bills of exchange for 3000*l.* each, dated the 19th of December, 1865, drawn by the

Blakeley Ordnance Company upon, and accepted by, the defendant, payable respectively at three and four months after date, and indorsed to the plaintiffs. Both actions were commenced by writ under the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67).

The writ in the first action was issued on the 24th of April and served on the 9th of July. On the 20th of July the defendant obtained leave to appear and plead on his affidavit, stating that the bill sued on, and also the bill sued on in the other action, together with other bills, were drawn by T. A. Blakeley, for the Blakeley Ordnance Company, upon the defendant, and indorsed to the plaintiffs by the Blakeley Ordnance Company, Limited, which had taken over the assets and liabilities of the former company; and that he had been informed by T. A. Blakeley, who was the manager of the Blakeley Ordnance Company, Limited, that the plaintiffs had been paid the full amount of the bills by the Blakeley Ordnance Company, and had no claim whatever on the bills against either company; and further stating to the effect of the fourth plea, which is set out below.

On the 8th of August the plaintiffs took out a summons to rescind this order, or for the defendant to bring the amount claimed into court. The summons was adjourned several times, and affidavits were filed on both sides; on the part of the plaintiffs, to the effect that they were entirely ignorant of the defendant's dealings with the Blakeley Ordnance Company, and denying the payment of the bills by that company, or by any person on their behalf; on the part of the defendant, to the effect that a sum of 8000*l.*, which had been remitted through the plaintiffs' bank, had been retained by them exclusively in payment of these bills.

Copies of the accounts of Blakeley, and of the Blakeley Ordnance Company, Limited (1), with the plaintiffs were afterwards produced; and from them it appeared that the bills had been discounted by the plaintiffs for Blakeley on the 23rd of December, 1865, and the amount placed to his credit; that he was also debited with the amount of the two bills when they were dishonoured respectively, on the 23rd of March and the 23rd of April, 1866; and that bills

(1) Blakeley and the Blakeley Ordnance Company were treated as identical, and the company was supposed to consist of Blakeley and one other person.

1866

AGRA AND MASTERMAN'S BANK v. LEIGHTON.

to the amount of 8442*l.*, discounted by the plaintiffs on the 11th of May, were also placed to his credit, this being the sum of 8000*l.* referred to in the affidavit; and it also appeared that at this date (11th of May) there was a balance on the accounts of about 100*l.* in favour of the plaintiffs, which was increased to 470*l.* at the closing of the account three days later.

On the 29th of August the following order was made upon the summons: "No order upon payment into court, or security for 3000*l.* in six weeks;" and the two actions were consolidated. (1)

On the 9th of October a summons was taken out by the defendant, to vary this order by striking out so much of it as required payment or security, or to extend the time limited. This summons was adjourned into court, and *M'Intyre,* in this term (Nov. 8), obtained a rule nisi in the terms of the summons.

On the 25th of October the plaintiffs delivered their declaration in the consolidated action, declaring upon the bills as drawn by the Blakeley Ordnance Company upon the defendant to their own order, and indorsed by that company to the plaintiffs. To this the defendant pleaded, first, denial of acceptance, second, denial of indorsement, on which the plaintiffs joined issue; and also the following pleas:

Third plea. That whilst the bills were in the hands of the plaintiffs, as holders, one T. A. Blakeley paid to the plaintiffs the full amount due to them in respect of the bills, and became entitled to become the holder of them, yet the plaintiffs did not deliver the bills to him, but are now suing on them without his authority, or the authority of any other person entitled to maintain an action upon the bills, or either of them.

Demurrer and joinder.

Fourth plea. On equitable grounds, that the bills were, and each of them was, accepted for the price of certain goods to be sold to, and shipped for and on account of the defendant, to Japan, and on the faith that the shipment of such goods had then been completed by the Blakeley Ordnance Company; that after the acceptance of the bills, and before the same or either of them became due, the company refused to complete the shipment, and only shipped

(1) The proceedings at chambers had in fact taken place in both actions, the same summonses being taken out, and orders made, in both.

certain of the goods, and that the defendant only received and accepted a certain portion of the last-mentioned goods, amounting in price and value to 1200*l.*; that by reason of the non-completion of the shipment, the goods actually shipped became useless to the defendant, who gave notice to the company that he would not accept and receive the residue of the goods so shipped; that except as aforesaid there never was any value or consideration for the acceptance or payment of the bills, or either of them, by the defendant; that whilst the bills were in the hands of the plaintiffs, as holders, one T. A. Blakeley, as agent of the company, paid to the plaintiffs the full amount due to them in respect of the bills, and the company then became entitled to be the holders of the bills, and the plaintiffs have since held them, without any value or consideration whatever; and as to the sum of 1200*l.*, the price and value of the goods accepted and received by him from the company, the defendant pleaded a set-off of equal amount against the company.

Demurrer and joinder.

Nov. 19. The rule and the demurrers came on to be argued together.

Cohen (*Coleridge, Q.C.*, with him), in support of the demurrers. First, as to the fourth plea. It amounts to no more than a statement of a partial failure of consideration, which cannot be pleaded to an action on a bill of exchange: Byles on Bills, pp. 119, 120, 8th edit. The statements of the plea must be taken strictly, and so taken they only shew a breach of contract, for which the defendant is entitled to recover unliquidated damages. He cannot repudiate the contract, for he has accepted part of the goods under it, and for these he is liable according to its terms; the drawer's performance has only been defective, not wholly wanting, and the rule cited therefore applies. This being so, his defence is not mended by being pleaded equitably, for equity here follows the rules of law: *Glennie* v. *Imri.* (1) This objection applies to the whole plea; but that part of it which relates to the set-off is open to this further objection. The defendant's contention must be, that the plaintiffs, having been paid the full amount of the bills

(1) 3 Y. & C. 436.

1866

AGRA AND MASTERMAN'S BANK v. LEIGHTON.

by the company, hold the bills as trustees for them, and are now suing in that character; but in that case the set-off, which is a debt from the company, the cestuis que trustent, is not between the parties to the action.

[CHANNELL, B. This is precisely the converse case to *Cochrane* v. *Green* (1), where a defendant was allowed to set-off a demand due from the plaintiff to the defendant through the defendant's trustee.]

The third plea is clearly bad on the authority of *Jones* v. *Broadhurst* (2), which shews that satisfaction by the drawer furnishes no defence to the acceptor, whose contract with the indorsee is entirely distinct and separate. It does not aver that the payment was made at the request or on behalf of the defendant (3), nor that there was in the payment any privity between him and Blakeley (4), nor that the payment was on any contract that the bill should be delivered up (5); nor does it even say that the plaintiffs are suing against the will or contrary to the order of Blakeley, but only that they are suing "without his authority." All that appears is, that some stranger has paid the amount of the bills to the plaintiffs, who may be now suing (consistently with the plea) as trustees for him.

Sir George Honyman, Q.C. (*M'Intyre* with him), in support of the pleas. As to the fourth plea, the failure of consideration is plainly such that it would be a good defence in an action against the defendant by the company; for it is stated by the plea, and admitted by the demurrer, that by reason of the non-completion of the shipment, the goods shipped became valueless to him. It is true that of what was shipped the defendant took part; but that only makes him liable to pay for the goods taken, and does not waive his right to insist on the total failure of consideration which had already occurred. The case, therefore, differs from the case of *Glennie* v. *Imri* (6), where that which the plaintiff complained of in his bill was, a defect in the quality of the goods supplied, which was only matter of a cross action. But it is also distinguishable from that case on the ground that, even admitting the consideration not to

(1) 9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97.
(2) 9 C. B. 173.
(3) 9 C. B. at p. 179.
(4) 9 C. B. at p. 180.
(5) 9 C. B. at p. 183.
(6) 3 Y. & C. 436.

have totally failed, the sum to be deducted is a definite sum. For the plea says that the goods taken amounted in value and price to 1200*l.*; but this is the only part of the consideration that has been performed; and if the sum of 1200*l.* is deducted from the total amount of the contract, it leaves a definite residue to be deducted from the sum due on the contract. It therefore falls within the exception included in the statement of the rule in Bayley on Bills, p. 505, 6th ed.—that "the partial failure of consideration will constitute no defence, if the quantum to be deducted on that account be matter, *not of definite computation*, but of unliquidated damages."

The third plea is also good. The statement is here made which was wanting in the plea in *Jones* v. *Broadhurst* (1), that Blakeley became entitled to become the holder of the bills, and that the plaintiffs are suing without the authority of any person entitled to maintain an action upon the bills. This statement is inconsistent with the notion that the bills have been left in the hands of the plaintiffs in order that they might sue upon them.

Cohen, in reply, cited *Moggridge* v. *Jones*. (2)

The Court then directed that the rule should be argued.

Cohen shewed cause.

Honyman, Q.C., was not called upon.

BRAMWELL, B. This rule must be made absolute. The intention of the Bills of Exchange Act was, that where there was no pretence for a defence, the party sued should not be allowed to defend, and the holder should have judgment as of course; but that, if the defendant had a real, I do not say good, defence, he should have leave to appear and set it up. As cases, however, sometimes occur where an apparently real defence is shewn, but its sincerity is doubtful, there the defendant is let in to defend only on the terms of his bringing the money into court. Now I cannot say that there is here no pretence for a defence; on the contrary, I think there is a good pretence. I do not say that the defence is well founded, but it raises a fair question between the parties. But, further, it often happens that a man comes in before the judge, and shews a good defence as between the parties to the bill, and also states his belief, from certain circumstances of more or less credit, that the plaintiff

(1) 9 C. B. 173; see p. 182. (2) 14 East, 486.

1866

AGRA AND MASTERMAN'S BANK v. LEIGHTON.

is not a holder for value; afterwards the plaintiff comes and shews that belief to be groundless. In such a case the leave to appear is rescinded, because it appears that the leave was originally given to him on a supposed state of facts which is shewn to be erroneous. Now, if the plaintiffs had shewn that they were holders for value, we ought to have rescinded the order for leave to appear, or made it conditional; but to my mind they do not shew that there is no question on this point. For on the accounts it appears that on the 23rd December they discounted these bills for 6000*l.* for Blakeley, and, on the bills being dishonoured, debited his account with the amount. Now certainly that was not payment; but afterwards Blakeley discounts bills with them to the extent of 8000*l.*, which at that time very nearly balanced the accounts between them. There were subsequent drawings to a small amount, resulting in a balance against Blakeley of about 470*l.*; but that is all. If that is so, there is, on the one hand, a fair question whether the defendant has a good defence against Blakeley; on the other hand, as it appears that the plaintiffs have no claim against Blakeley, their interest and Blakeley's in this sum are the same, and it is not clear that they have any right of recourse against the defendant; for if the old dishonoured bills ought to have been handed over to Blakeley, the plaintiffs can have no claim upon them against the defendant. At all events, this is not a case of the kind intended by the act, that is, a case where there is no real question between the parties.

CHANNELL, B. I am of the same opinion. I do not understand that the Bills of Exchange Act requires or authorizes the judge to try the merits of the action; it requires leave to appear to be specially granted to the defendant only in order to prevent vexatious and unfounded defences. Now, on the affidavits before the judge, the leave to appear was originally well granted, the defendant stating facts not inconsistent with a good defence on the merits. The question, therefore, is, whether the leave originally given ought to remain, or whether it ought to be rescinded, or allowed to stand on terms. The effect of the order appealed from was to clog it with a condition; and, on the best consideration I can give to the question, I think there is no sufficient reason for imposing that

restriction. The order, as at first made, was properly made, and the ground on which it was made is not displaced by the affidavits. Leave to appear is often given on a statement of circumstances, which would be a conclusive defence as between the original parties to the bill, but which are not so in an action by the holder, unless he is shewn not to be a holder for value. As to this latter point, the evidence which the defendant adduces naturally cannot be so cogent, though it may be sufficient to raise a presumption. In such a case it is an exception occurring in every day's practice, to admit the plaintiff's answer on affidavits, not to displace cogent evidence, but to answer that part of the defendant's statement which is necessarily qualified and doubtful. The plaintiffs' affidavits here fail to do so, and the rule must therefore be made absolute.

PIGOTT, B. Primâ facie, the defendant shows a bonâ fide defence, and, if so, he ought to be allowed to set it up, without having the terms imposed upon him of bringing the money into Court.

Rule absolute to vary the order by striking out the condition.

The Court then delivered judgment on the demurrers.

BRAMWELL, B. I think the third plea is bad. The plea is, if I may say so, bad because it is not good, when the pleader might so easily have made it good if he had chosen. To make it good this meaning must be given to it—that the plaintiffs were not the lawful holders of the bills at the time when the action was brought. But this is not the true meaning of the plea, because the payment of the full amount due, which is the ground of the defence stated, has no such necessary consequence. The payment may have been made on account, or for many different reasons, and not as a satisfaction of the bills. But it is further said, that Blakeley by such payment became entitled to be the holder of the bills. Possibly; but it is quite consistent with this that although, if he had insisted upon it, the plaintiffs must have delivered the bills to him, yet he did not so insist, and they continued to have the de facto possession of the bills, and were entitled to the remedies of holders against the defendant. Whether, if the plea had alleged that the plaintiffs

1866

AGRA AND MASTERMAN'S BANK v. LEIGHTON.

were not, at the commencement of the action, the lawful holders of the bills, it would have been a good plea, I will not say; but I can conjecture the reason why this was not said. The bills may have been purposely left in the hands of the bankers, as a further security in the event of the other discounted bills being dishonoured; so that though, in one sense, all was paid, yet it would not be true that the plaintiffs were not entitled to sue. I must therefore hold the plea to be bad, because I cannot see that it is good.

But I think the fourth plea good, and I understand it thus: "I accepted these bills in payment for goods sold to me at certain prices by the drawers, and which were to be shipped to me by them; and, in fact, all which were to be shipped were not shipped, and of those shipped I only took a portion; and, the whole not being shipped, that portion became valueless to me, and I therefore refused to take the residue." Now, if the plea shews a good answer as to all except the 1200*l.*, the price of the goods taken, it is a good plea. Does it, then, shew such an answer? Suppose I order 1000 pairs of stockings and 1500 pairs of gloves to be sent out to me; the stockings are sent, and I take them; but only right-hand gloves are sent, and I do not take those. The consideration for the bill might have wholly failed, for I might have rejected all; but since I took a part, I must pay for them. I was not bound to take that part, but, because I did take them, I am bound to pay, not by the original contract, but by the fact of taking them. If this is the meaning of the plea, as I think it is, it is a good plea, and judgment must be for the defendant on the demurrer to this plea, for the plaintiffs on the demurrer to the third.

CHANNELL, B. I am of the same opinion. On the third plea I have had some doubt whether it might not be upheld, as alleging that the plaintiffs at the commencement of the suit were not holders of the bills—not saying that they were not in possession of the bills, but that they were not holders with a right to sue. But, on the ground suggested by my Brother Bramwell, I think the plea fails. If upheld at all, it must be on the ground that the plaintiffs were tortious holders of the bills; but it stops short of stating circumstances which require that inference. It does not say that the plaintiffs sue against the will of Blakeley, but only

that they sue without his authority; and it is consistent with this averment that Blakeley has not interfered, and that they are therefore entitled to sue.

On the demurrer to the fourth plea, the defendant is, I think, entitled to judgment. The substance of the plea is this: "I accepted the bills on the faith of goods being shipped at certain prices; some were shipped, but not all; I did not take to all the goods shipped, but to a portion of them, and for those I am bound at law and in justice to pay, but not for the others." Then the plea is good as to all except the goods appropriated. In holding thus I do not mean to throw any doubt upon the cases which decide that, where the defendant seeks to discharge himself on the ground of a partial failure of consideration, he cannot do so by setting up a partial failure to the extent of unliquidated damages. But here, looking to the language of the plea, the sum in respect of which the set-off is claimed is made by the pleading a definite sum, amounting to 1200*l.* If the plea had gone on to say, "amounting, according to the contract, to 1200*l.*," there would have been no doubt; but, although the language is not so specific as it should be, yet as it says, not "amounting" merely, but "amounting in value and *price* to 1200*l.*," the sum is made sufficiently definite to take the case out of the rule which does not allow a claim for unliquidated damages to be pleaded to a bill of exchange. As to the set-off, our decision will be in accordance with the rule to be deduced from the case of *Cochrane* v. *Green* (1); there the cestui que trust was allowed to set up his trustee's claim against the plaintiffs; here, conversely, we allow the defendant to set up against the trustee's claim the debt due from the cestui que trust.

PIGOTT, B. I am of the same opinion. It is consistent with the facts stated in the third plea that the plaintiffs are rightfully in possession of the bills, with the ordinary rights of action of holders; it is therefore bad. But the fourth plea is good. The rule laid down in Bayley on Bills, as to a partial failure of consideration not being a good defence to a bill of exchange, does not apply to cases where the amount to be deducted is a matter of definite computation, but only to cases of unliquidated damages. Looking at the

(1) 9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97; 7 Jur. N.S. 548

1866

AGRA AND MASTERMAN'S BANK v. LEIGHTON.

language of this plea, the amount is clearly stated to be a matter of definite computation, and the plea is therefore good.

Judgment for plaintiffs on demurrer to third plea; for defendant on demurrer to fourth plea.

Attorneys for plaintiffs: *Uptons, Johnson, & Upton.*
Attorneys for defendant: *Courtenay & Croome.*

Nov. 23.

WOOD AND ANOTHER *v.* PRIESTNER.

Guarantee, Continuing—Future Debt—Construction.

The defendant's son being indebted to the plaintiffs for coals supplied on credit, and the plaintiffs refusing to continue to supply coals unless guaranteed, the defendant gave this guarantee: "In consideration of the credit given by the H. G. C. Co. to my son, for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*; and in default of his payment of any accounts due, I bind myself by this note to pay to the H. G. C. Co. whatever may be owing, to an amount not exceeding the sum of 100*l.*":—*Held*, a continuing guarantee.

ACTION on a guarantee. The defendant's son, a coal-dealer, for some time previous to the giving of the guarantee, purchased coals of the plaintiffs, who traded under the name of the Hindley Green Coal Company, settling with them on monthly accounts. On the 10th of June, 1861, he was in debt to them on the March, April, and May accounts, in the sum of about 170*l.*, and some difficulty arising between him and the plaintiffs, they refused to continue to supply him with coals unless he gave security. He paid 9*l.*, and accepted a bill of exchange at three months for 61*l.*; and one of the plaintiffs having written out the guarantee sued on, the son procured the defendant's signature to it.

The guarantee was as follows:—"Wilmslow, June 10, 1861. In consideration of the credit given by Messrs. The Hindley Green Coal Company to my son, Mr. James Priestner, for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*, and in default of his nonpayment (1) of any accounts due, I bind myself by this note to pay to the Hindley Green Coal Company whatever may be owing, to an

(1) This word was taken to have been written for *payment*.

amount not exceeding the sum of 100*l*. (Signed) Wm. Priestner." There was no evidence that the defendant knew the state of accounts between his son and the plaintiffs.

The plaintiffs thereupon continued to supply the son with coal on credit until, in June, 1865, he executed a deed of assignment under the Bankruptcy Act, 1861. He then owed the plaintiffs 349*l*., of which the assets would pay only a very small fraction. The debt due at the date of the guarantee appeared to have been discharged by subsequent payments. The son had since died.

The case was tried before Martin, B., at the Lancashire summer assizes, and a verdict was entered for the plaintiffs, leave being reserved to the defendant to move to enter a nonsuit on the ground that the guarantee was not a continuing guarantee. A rule having been obtained accordingly,

James, Q.C., and *Baylis*, shewed cause. The surrounding circumstances may be taken into account to assist the construction of the instrument: *Carr* v. *Montefiore* (1); and among those circumstances is the fact, that the plaintiffs had previously supplied the defendant's son on credit, and after the giving of the guarantee, and in consequence of it, continued so to supply him. This shews that the future supply was intended to be secured, and the natural construction of the words is to the same effect. *Hoad* v. *Grace* (2) shews that the words "coals supplied" may properly refer to the future. The words "any accounts due," also naturally express a current account, including the future as well as the past. If the plaintiff's construction were not adopted, it would be necessary to say either that the consideration was past, and the guarantee therefore void, which is a conclusion to be escaped, if possible, or else that the guarantee was given for the forbearance of a debt already due, which the words do not at all express. They also cited *Kennaway* v. *Treleavan*. (3)

Holker, in support of the rule. A guarantee must be interpreted strictly, and the guarantor's liability not extended by inference: per Bayley, B., *Nicholson* v. *Paget*. (4) If circumstances are to be used to aid the construction, they favour the defendant's contention; for

(1) 5 B. & S. 408; 33 L. J. (Q.B.) 256.
(2) 7 H. & N. 494; 31 L. J. (Ex.) 98.
(3) 5 M. & W. 498.
(4) 1 Cr. & M. at p. 52.

1866

WOOD v. PRIESTNER.

the payment, the bill, and the guarantee nearly make up the amount of the existing debt. But the words are in their true construction inconsistent with the plaintiffs' construction, for even admitting that the consideration is the future supply of coals on credit, it does not follow that it is this supply that is guaranteed; the words "any accounts due" naturally mean *now* due, and "may be owing" means may be *now* owing; it is consistent with the defendant's ignorance of the state of the accounts between his son and the plaintiffs, that he should use indefinite terms in describing them. *Allnutt* v. *Ashenden* (1) is a strong authority in the defendant's favour.

KELLY, C.B. I think this is clearly a continuing guarantee. The question in these cases depends not merely on the words; but, when the words are at all ambiguous, requires a consideration of the circumstances to aid the construction. It is, therefore, necessary to look at the existing state of things, and looking to that, to construe the words in such a way as we consider most consistent with the intention of the parties; not, indeed, considering any statement of either party as to what he meant by the words used, but taking the words themselves, together with the surrounding facts, as the exponents of the meaning of both. The first fact is, that on the 10th of June, 1861, when the guarantee was given, the defendant's son already owed to the plaintiffs a debt of more than 100*l.* for goods supplied. The guarantee is expressed to be "in consideration of the credit given by Messrs. The Hindley Green Coal Company to my son, J. P., for coal supplied by them to him." Now, we are not to assume that the consideration intended was the credit previously given, which, as being a past consideration, would make the guarantee bad. And if the real consideration were the forbearance to sue for the debt which had become due upon that credit, one would expect to find words plainly expressing (if, indeed, such a document as this were used at all), that whereas credit had been already given, and a debt incurred for coal supplied, the defendant undertook to guarantee the amount so due in consideration of a forbearance to sue, upon ascertained terms, and for a definite period. The presumption,

(1) 5 M. & G. 392.

then, is against the inference that the guarantee extended only to the existing debt. But there is the further fact, that after this guarantee was given, the supply of coals, which had been previously suspended, was continued; from which we may assume that it was intended by the parties that it should continue; and as the coals had before been supplied on credit, resulting in the then existing debt, we may also assume that it was contemplated by the parties that there should be a continuing credit, resulting in a fresh debt; that this continuing credit, therefore, was the consideration, and the debt resulting from it included in the guarantee. The same conclusion follows from the words in which the defendant states the obligation which he incurs, as to which statement I may observe that if the intention were only to guarantee the existing debt, it is difficult to see why a lengthy instrument like this should be adopted, when a promissory note, drawn in specific terms, would have answered all the purpose. The form, then, of the guarantee is this: "I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*, and in default of his payment of *any accounts due*, I bind myself by this note to pay to the Hindley Green Coal Company whatever *may be owing* to an amount not exceeding the sum of 100*l.*" Now, as it appears that the sum of 100*l.* was made up of various smaller sums, too much stress must not be laid on the words "any accounts due." But do the words "whatever may be owing" refer to an account already due, or to a sum which will be due whenever the guarantee shall be put in force? They seem not suitable to a specific and ascertained sum already due, but have a direct and proper application to what might afterwards become due. The whole may be properly read "in consideration of your continuing to supply coals on credit to my son, I guarantee the payment of any sum which may become due from him to you on the coal account." Construing this instrument, then, both by the words and the circumstances, I come to the conclusion that it is a continuing guarantee, and that the plaintiffs are therefore entitled to recover, and the defendant's rule must be discharged.

MARTIN, B. I do not mean to dissent from the judgment of the Chief Baron; but the case is not to my mind a clear one.

1866

Wood v. Priestner.

With respect to the facts they are these: the defendant's son had dealt with the plaintiffs, and incurred a debt of 170*l.*; they asked for payment, and on his treating their demand with rudeness, refused to continue to supply him unless he procured a guarantee. On the 10th of June 9*l.* was paid by the son, and a bill of exchange given for 61*l.*; there thus remained 100*l.* unsecured, and the guarantee in question was written out by one of the plaintiffs, and sent by the son to his father, the defendant, to sign. He signed it, and there is really no evidence that he knew anything more of the son's transactions with the plaintiffs. If the circumstance of the existing debt be taken into consideration, there is much force in the argument that the instrument should be read as limited to the 100*l.* then due; and if the defendant is to be held liable, I think it must be on the words of the guarantee itself. These are consistent with the defendant's view, but it is not clear that they may not be read as contended for by the plaintiffs. I cannot assent to the opinion expressed by Bayley, B., in *Nicholson* v. *Paget* (1), that a contract of guarantee ought to be read in any peculiar way. I think it should be read in the same way as any other contract, and as I cannot say that this guarantee will not bear the interpretation given to it by my Lord and my learned Brothers, I concur in their judgment.

Bramwell, B. It is difficult to say that any of these cases are clear, for they always result from the insufficiency of the expressions used; but I think that this ought to be read as a continuing guarantee. We not only may, but must, in the case of every contract, have evidence who are the parties to it, and what are the circumstances to which it relates. If the best known man in England were letting to the next best known man the best known property, it would still be necessary to prove who the parties were, and what they were dealing with. Now here the son was in debt to the plaintiffs on an account for coals supplied, and a further dealing on credit was contemplated. The guarantee is expressed to be in consideration of credit given; if this referred to past credit, it would refer also to a past consideration, and the contract, stating a *bad* consideration, would

(1) 1 Cr. & M. at p. 52.

1866

WOOD v. PRIESTNER.

not be helped by the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 3). There is a presumption against the defendant giving an invalid document, or the plaintiffs receiving it, and the words do not require such a construction. It is then contended, that the consideration is, the forbearance to sue for the existing debt. But, as the Chief Baron has observed, the expression would in that case not be accurate; if this were meant, it would be expressed that time was to be given by the plaintiffs, and probably some time would be named. I bow to the authority of the case of *Allnutt* v. *Ashenden* (1), but I do not understand it; and I cannot adopt the dictum contained in *Nicholson* v. *Paget*. (2) Interpreting this instrument in the same way as other contracts, I think it refers to credit for goods to be supplied. It is said that this would not be a usual expression, and that the words must be altered to make them bear that meaning. But I think not: if you proposed to deal with a coal merchant, and were to say to him, "Is there any credit given here?" he would say, "Yes; we give (suppose) a fortnightly credit for coals supplied." The expression of giving credit is proper to supplying goods without payment, not to the forbearance to sue for a debt already incurred for goods so supplied. Further, the defendant binds himself to pay "in default of his son's payment;" these words naturally refer, not to any account now due, because on that account default had already been made, but to a fresh account which the son might fail to pay when it became due. If the contrary were intended, the proper expression would be, "I bind myself to pay the sum now due." On these grounds I am of opinion that this is a continuing guarantee. I am not quite sure whether we should be justified in applying the consideration I am about to mention to the interpretation of the intention of the parties, but I may observe that to confine a guarantee to a past transaction is a very idle thing, for the whole matter is reduced to a question of book-keeping. The creditor, who had the old debt secured, would insist upon the payment of the new and unsecured debt, rather than the old one, and would appropriate to that debt any payments he received from the debtor. But whether the defendant did or did not mean to make himself liable on a continu-

(1) 5 M. & G. 392. (2) 3 Cr. & M. at p. 52.

1866

WOOD v. PRIESTNER.

ing guarantee, that is the construction which we must give to the written contract.

PIGOTT, B. I have not been free from doubt, but I have arrived at the same conclusion as the rest of the Court. I should have thought more of the fact of the guarantee being for the amount of the debt, after deducting the sum paid and the bill of exchange, if it had been an odd sum, instead of the round sum of 100*l.*, which is not so naturally identified with a specific existing debt. Looking at the words and the circumstances, I agree that this instrument is a continuing guarantee, and that the rule must be discharged.

Rule discharged.

Attorneys for plaintiffs: *Gregory & Co., for W. L. Welsh, Manchester.*

Attorneys for defendant: *Edwards, Layton, & Jaques, for J. Eltoft, Manchester.*

Nov. 20.

BOS AND ANOTHER *v.* HELSHAM AND ANOTHER.

Vendor and Purchaser—Conditions of Sale—Condition for Compensation for Mistake in Particulars—Mistake discovered after Conveyance—Arbitration —Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *ss.* 11, 13.

At a sale by auction of premises belonging to the defendants, stated in the particulars of sale as being then let at a rental of 30*l.* per annum, one of the conditions was that, if any mistake was made in the description of any of the properties offered for sale, or if any error whatever appeared in the particulars of sale, such mistake or error should not annul the sale, but a compensation in such case should be given, to be settled by two referees, one to be appointed by either party to the sale, or an umpire. The plaintiffs purchased of the defendants the premises subject to this condition. After the conveyance had been executed, an error in the rental stated in the particulars was discovered:—

Held, that the error was a proper subject of compensation within the meaning of the condition, although not discovered until after the execution of the conveyance.

The defendants having failed to appoint a referee for seven clear days after the plaintiffs had appointed one, and after a notice in writing requiring them to make the appointment, the plaintiffs, acting under the provisions of the Common Law Procedure Act, 1854, s. 13, appointed their referee to act as sole arbitrator, and a

sum of money was awarded by him to them by way of compensation for the error :—

1866

Bos v. Helsham.

Held, following *Collins* v. *Collins* (26 Beav. 306; 28 L. J. (Ch.) 184), that the reference indicated in the condition being one of the quantum of compensation only, was not a reference to arbitration of an existing or future difference within the meaning of the Common Law Procedure Act, 1854, s. 11; and that the plaintiffs had, therefore, no power under s. 13 of that act, to appoint their referee as sole arbitrator.

Declaration that the defendants put up for sale by public auction certain properties described in certain particulars of sale, and amongst others a property described by the defendants in the particulars as two freehold dwelling-houses and shops, one of which was let "to Mr. Beard at 30*l.* per annum." That amongst the conditions of sale was the following condition: "The several properties are believed, and shall be taken, to be correctly described as to quantities and otherwise, and are sold subject to all chief and other rents, rights of way and water, and other easements if any charged or subsisting thereon. If any mistake be made in the description of any of the properties, or if any error whatever shall appear in the particulars of sale, such mistake or error shall not annul the sale of the lot to which such mistake or error may relate; but in such case a reasonable compensation or equivalent shall be given or taken, as the case may require either way, such compensation or equivalent to be settled by two referees, one to be appointed by either party, or an umpire to be named by the referees before they enter upon the reference, whose decision shall be final." That at the auction the plaintiffs were the purchasers of the said property, upon and subject to the above condition, at the price of 690*l.*, and thereupon the plaintiffs and the defendants agreed that the defendants should sell to the plaintiffs, and that the plaintiffs should buy of the defendants the property so described, at the said price, subject to the said condition. Averment, that a mistake was made in the description of the said property, and that an error in the description of the said property appeared in the particulars of sale to the prejudice of the plaintiffs, to wit, that the property was described in the particulars as of a higher annual rent and a greater annual value than the same then really was, and it was not stated in the particulars, as the fact was, that all the rates and taxes of the houses were, by agreement with the tenant, paid by

W. R. 5 Jur. N. S. 30.

1866

Bos
v.
Helsham.

the landlord; that thereupon the plaintiffs became entitled to be paid or allowed by the defendants a reasonable compensation or equivalent in respect of the said mistake or error, to be settled in the manner prescribed by the conditions; that thereupon the plaintiffs appointed a referee to settle such compensation or equivalent according to the condition, and did all things necessary, &c., to entitle the plaintiffs to have the defendants appoint a referee on their part. First breach, that the defendants did not nor would appoint any such referee, but neglected and refused to do so. Second breach, that the defendants failed to appoint an arbitrator or referee according to the condition, or at all, for seven clear days after the plaintiffs had appointed an arbitrator, and had served the defendants with notice in writing to make the appointment of an arbitrator on their part; that the plaintiffs did all things necessary on their part, &c., to entitle them to appoint the said arbitrator, to act as sole arbitrator in the reference, and did thereupon appoint him to act as sole arbitrator; that the said arbitrator duly took upon himself the reference, and duly made his award in writing, and pursuant to the condition awarded that the amount payable in respect of such reasonable equivalent and compensation for the said mistake and error to be paid by the defendants to the plaintiffs was 113*l.*, of all which the defendants had due notice; that the plaintiffs did all things, &c., necessary on their part to entitle them to be paid the said sum by the defendants, yet the defendants did not pay the same.

Plea on equitable grounds, setting out all the conditions of sale [the third of which stated that the defendants were selling as trustees and executors under the will of one Percy Sadler; the fourth of which enabled the purchaser within a specified time to make requisitions and objections to the title; and the ninth of which was that set out in the declaration], and averring that the defendants agreed to sell the property therein mentioned to the plaintiffs upon the terms stated; that the defendants had no beneficial interest in the property, but were trustees and executors only; that the plaintiffs, acting under the fourth condition, investigated the title and approved of it; that afterwards the defendants by their deed, in consideration of the sum of 690*l.*, conveyed the hereditaments so agreed to be sold to the plaintiffs in fee, and the

plaintiffs accepted the conveyance and paid the purchase-money, and the purchase was then finally completed; that the plaintiffs had, from the time of the execution of the conveyance, been in receipt of the rents and profits; that after the completion of the sale by execution of the conveyance and payment of the purchase-money, and after the lapse of a reasonable time from the completion of the purchase, the plaintiffs discovered and gave notice to the defendants of the alleged error and mistake in the particulars of sale, and until then the defendants had no notice of it; and that the referee was not appointed until afterwards.

Demurrer and joinder.

J. Brown, Q.C. (*Lopes* with him), for the plaintiffs in support of the demurrer. First, the liability of the defendants is not affected by their being sued in their fiduciary character. At law they are liable for a breach of their agreement, whether they have or have not a beneficial interest. [This point was conceded on the part of the defendants.] Secondly, as to the first breach, the plea affords no answer. The terms of the ninth condition of sale are perfectly general. They are not limited to errors or mistakes discovered *before* the completion of the sale by the execution of the conveyance, and that being so the plaintiffs are entitled to compensation at whatever time the error or mistake in the particulars of sale is discovered: *Cann* v. *Cann* (1); *Thomas* v. *Powell.* (2) Thirdly, as to the second breach, the plaintiffs are entitled to recover the amount awarded by the sole arbitrator appointed by them. The reference indicated in the ninth condition is an arbitration within the meaning of the Common Law Procedure Act, 1854, s. 11, which applies to future as well as to existing differences. The plaintiffs were therefore justified in appointing, under s. 13, an arbitrator to act alone and assess the amount of compensation due to them.

Henry Matthews, contrà. First, as to the first breach; although the language of the condition is general, the purchaser cannot recover for errors in the particulars of sale, unless he discovers them before the completion of the sale by execution of the conveyance: *Okill* v. *Whittaker.* (3) In Dart's Vendors and Purchasers, 3rd ed. p. 503, it is said that with "some few special exceptions,

(1) 3 Sim. 447. (2) 2 Cox Chanc. Cas. 394. (3) 2 Phill. 338.

1866

Bos
v.
Helsham.

a purchaser, after the conveyance is executed by all necessary parties, has no remedy at law or in equity in respect of any defects either in the title to or quantity or quality of the estate"; and the same doctrine is laid down in Lord St. Leonards' Vendors and Purchasers, 13th ed. pp. 232, 233, where the writer remarks that a conveyance executed will not easily be set aside without fraud, or without some unconscionable circumstance being proved whence fraud might be implied. In the same work it is also stated (p. 197) that after contract executed, "a bill cannot be filed simply for compensation, *e.g.*, where the rental of the estate was represented higher than its actual amount": *Newham* v. *May*. (1) The "special exceptions" above referred to are cases where there is fraud express or implied on the part of the vendor, or where the estate is sold compulsorily under a decree of the Court, as was the case both in *Cann* v. *Cann* (2) and *Thomas* v. *Powell*. (3)

[Kelly, C.B. It is admitted that there are "special exceptions" to the general rule. Is not this one of them? Have not the parties expressly contracted that compensation shall be given *whenever* the error is discovered? Moreover, the knowledge that the condition is perfectly general in its terms, and unlimited as to time, might well throw a purchaser off his guard during the progress of completing the sale.]

The same observation would apply to a case where, as invariably happens, there is an express covenant for title; yet it is clear that no objection to the title can be taken after conveyance executed. Again, the construction contended for is reasonable, and confines the liability of the vendors, who are trustees, within moderate limits. It is warranted, too, by the language of the condition, which only applies to errors whose existence would have annulled the sale: *Leslie* v. *Thomson*. (4) This error would not have done so, for there is no *warranty* that the rent shall be exactly as stated. Secondly, as to the second breach. This is not an "arbitration" within the meaning of the Common Law Procedure Act, 1854, s. 11. In *Collins* v. *Collins* (5) it was held that a reference of the price simply of certain property to arbitrators does not constitute an arbitration within that act. But under this ninth

(1) 10 Price, 117. (2) 3 Sim. 447. (3) 2 Cox Chanc. Cas. 394.
(4) 9 Hare, at p. 273. (5) 26 Beav. 306; 28 L. J. (Ch.) 184.

condition of sale, nothing but the *quantum* of compensation can be assessed. The case is one of valuation only. The condition assumes that the parties are agreed as to there being some error or other, and only empowers the referees to inquire how much is to be given or taken in respect of it. The plaintiffs, therefore, had no right to avail themselves of the provisions of the Common Law Procedure Act, 1854, s. 13, and the award of damages by their sole arbitrator is of no effect against the defendants: Russell on Arbitration, 4th ed. p. 32; *Leeds* v. *Burrows* (1); *Lee* v. *Hemingway*. (2)

J. Brown, Q.C., in reply.

Kelly, C.B. I am of opinion that, as to the first breach in the first count of the declaration, the plaintiffs are entitled to our judgment. It is unnecessary to enter into the nice distinctions which exist between warranties and false representations. I acquiesce in the general doctrine laid down on the subject in Sugden's Vendors and Purchasers, and in the difference which the author points out between objections entitling a purchaser to annul a contract before completion of the conveyance, and those which may be raised after completion, where a court of equity will not interfere, and there is no remedy at law, even though the objections are well-founded, because they have not been taken in proper time. But in this case, as if with a view of avoiding these distinctions and differences, the parties themselves have expressly contracted that if any mistake be made in the description of the property, or any error occurs in the particulars of sale, such mistake or error shall not annul the sale, but a reasonable compensation, to be assessed in a specific manner, is to be given. Now, here it is to be observed that no distinction is made, though it would have been easy to make it, between an error or mistake discovered *before*, and one discovered *after*, the execution of the conveyance. Such a distinction is sought on the part of the defendants to be imported into the contract, although the contract itself is silent. I do not think it necessary so to import it, for this reason, if for no other, that here in order to avoid any inquiry involving delay into the value of the property or its rental, there is an express condition in the terms I

(1) 12 East, 1. (2) 15 Q. B. 305 (note).

1866

Bos v. Helsham.

have referred to, the operation of which is wholly unlimited in point of time or in any other respect. Any other construction would subject the purchaser to considerable disadvantage. For if he had supposed or been aware that, should there be any error or mistake, he must object on that account before the execution of the conveyance, or else not at all, he would of course make prudent and searching inquiries previously to completion. But where the contract contains a condition like this, he would naturally be somewhat thrown off his guard in the interval of time between the commencement and completion of the contract. He would feel himself bound to complete, whether there were any objection or not on the score of misdescription, and whether it were well or ill founded. Then is he to be told afterwards, that in spite of the condition, his opportunity to object is gone? Surely he has a right to reply: "My contract provides otherwise; I make my claim now, and I make it under the express terms of my agreement with the vendor." There may, indeed, be many reasons for the introduction of such a term as this, giving compensation for errors or mistakes; and it would be hard and inequitable to say that a mistake which the purchaser probably had neither means nor opportunity of discovering previous to the conveyance of the property, and his entering into the enjoyment of it, could not be remedied. The term seems to me to be inserted by way of safeguard, and I am of opinion that the plaintiff is entitled to sue for compensation. The case is, in my judgment, one of those "special exceptions" to the general rule mentioned by the learned text writer who has been referred to.

With regard to the objection to the second breach, I may observe that I think it matter for regret that any subtle distinctions should prevail in cases concerning the arbitration clauses of the Common Law Procedure Act, 1854. In general it is highly desirable that where an arbitration of any sort has been agreed on between parties, these clauses should be held to apply. But we are bound to look to authority, and I cannot distinguish the present case from that of *Collins* v. *Collins* (1), either in substance or principle. The principle as there laid down amounts to this—

(1) 26 Beav. 306; 28 L. J. (Ch.) 184.

that, to make an arbitration within the act, there must be an actual difference between the parties; and where the contract assumes and provides for no difference, and where probably there is no difference in fact, then, according to that authority, the case is not one of arbitration. "An arbitration," says the Master of the Rolls, in that case (1), "is a reference to the decision of two or more persons, either with or without an umpire, of a particular matter in difference between the parties; and although it is very true that in one sense it must be implied, either that there is a difference, or that a difference may arise, between the parties, yet the distinction is material, and one which has been properly relied on." And further on he adds: "If two persons enter into an agreement for the sale of property, and try to settle the terms, but cannot agree, and after dispute and discussion respecting the price, say we will refer the question of price to A. B., he shall settle it, and they agree that the matter shall be referred to his arbitration, that would appear to be 'arbitration' in the proper sense of the term within the meaning of the act; but if they agree to a price to be fixed by another, that does not appear to be arbitration." Now, applying this language to the case before us, there is nothing in this condition of sale to imply or point to a difference arising between the parties. It simply provides that in case of error or mistake, a reasonable compensation to be assessed by referees is to be made; and it points to no difference existing or likely to exist, so as to give the subsequent proceedings the character of an arbitration. If, then, we tried to distinguish this case from *Collins* v. *Collins* (2), we should, I think, be introducing those subtle distinctions between case and case which are so much to be deprecated. The plaintiffs, therefore, are entitled to our judgment on the first breach, and the defendants on the second.

Channell, B. I am of the same opinion. The case comes before us on a demurrer to a plea, which is pleaded to both the breaches in the declaration. It is therefore necessary to consider each breach singly. Now there are many points which have been touched on during the argument which it is unnecessary to decide.

(1) 28 L. J. (Ch.) at p. 186. (2) 26 Beav. 306; 28 L. J. (Ch.) 184.

1866

Bos
v.
Helsham.

We need not decide, for instance, what would have been the parties' rights had there been no ninth condition of sale,—whether or not such a mistake as has occurred would or would not have annulled the sale. Here there is an express condition that it shall not annul it. Nor need we examine the authorities which are supposed to decide that the parties' rights are concluded after conveyance executed, purchase-money paid, and possession given, except where there has been fraud or circumstances (such as gross inadequacy of price) whence a court of equity would imply fraud. For we are not called upon to *rescind* this contract. The contract stands, possession has been taken, the conveyance executed, the price paid; and the only question on the first breach is, whether there is or is not a right to sue for compensation for an error in the particulars of sale, discovered after the completion of the conveyance. I am of opinion that there is such a right. It is contended that the execution of the conveyance concluded the parties, but we are dealing with an express contract between them, from which the right to sue springs. Why should we limit it? Why should we say that because the purchaser did not discover the error until after completion he cannot sue for compensation? It seems to me that such a decision would be making a new contract between the parties different from that which they have made themselves. Seeing, then, that the contract of sale can well stand, and yet that this claim, which is founded on an independent condition, can be enforced, I am of opinion that on the first breach the plaintiffs are entitled to our judgment.

With regard to the second breach, the same point arises as upon the first. But then the plaintiffs seek to recover not merely damages, but a specific sum. The breach is framed on the principle that the plaintiffs can recover the sum awarded as compensation by their referee acting alone. It is contended that we must read the ninth condition in connection with section 13 of the Common Law Procedure Act, 1854, and that, so reading it, the amount due has been ascertained properly and with sufficient accuracy. I should have had some doubt on the subject independently of the case of *Collins* v. *Collins* (1), but having regard to that decision, I feel bound to hold that the amount of compen-

(1) 26 Beav. 306; 28 L. J. (Ch.) 184.

sation has not been ascertained so as to enable the plaintiffs to recover. On this breach, therefore, I am of the same opinion as my Lord Chief Baron, that our judgment should be for the defendants.

Pigott, B. I am of the same opinion on both points. As to the first breach, I ground my judgment on the construction to be placed on the special contract between the parties. An error having been discovered in the particulars of sale after the execution of the conveyance, the question is, whether the purchaser may fall back on the terms of the condition, and allege that he is still entitled to compensation. I am of opinion that he may do so. No time is fixed by way of limitation within which compensation may be recovered. That being so, the case seems to me one of the special exceptions to the general rule laid down in Mr. Dart's Vendors and Purchasers.

As to the second breach, I do not think this a matter of arbitration within the meaning of the arbitration clauses in the Common Law Procedure Act, 1854. There is no matter in difference between these parties. This appears clear by noticing what it is which is meant to be referred, namely, the amount of compensation if there was any error. The language of the condition assumes that the parties are in agreement as to there being an error, and the only question remaining would be one of amount. Following the decision in *Collins* v. *Collins* (1), therefore, in which I concur, my judgment on this point is for the defendants.

Judgment for the plaintiffs on the demurrer to the plea, so far as regards the first breach in the first count: and for the defendants on the demurrer to the plea so far as regards the second breach.

Attorneys for plaintiffs: *E. J. Sydney & Sons.*
Attorney for defendants: *Robert Helsham.*

(1) 26 Beav. 306; 28 L. J. (Ch.) 184.

END OF MICHAELMAS TERM.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXX VICTORIA

1867
Jan. 11.

JOHNSTON AND OTHERS *v.* KERSHAW.

Principal and Agent—Foreign Market—Exigencies of Market—Order to purchase, Substantial Compliance with—Money paid.

2 QB. 99.
2 QB. 166.
5 QB. 528
5 H. L. 400.
411,
9 QBD 222

The defendant, who resided at Liverpool, gave to the plaintiffs, who carried on business at Pernambuco, an order to purchase 100 bales of cotton of a specified quality, in the following terms: "I beg to confirm my letter of the 23rd of February, and hope you will have executed fully all the cotton ordered, and consider still in force. If executed, please regard this as a new order for 100 more." The plaintiffs, acting on this order, purchased in the market, and paid for, ninety four bales of the specified cotton. No direct evidence was given as to the then state of the Pernambuco market; but the circumstances of the case rendered it reasonable to infer that the plaintiffs, in purchasing ninety four bales, had done all that was practicable. The defendant declined to pay for these bales on the ground that his order had been inadequately performed:—

Held, that the order must be construed with reference to the state of market for which it had been given, and that it had been substantially complied with.

DECLARATION for money payable for goods bargained and sold, work done and commission due in respect thereof, for money paid, and for money found to be due on accounts stated.

Plea, never indebted. Issue thereon.

1867

JOHNSTON v. KERSHAW.

The cause was tried before Martin, B., at the Liverpool summer assizes, 1866, when the following facts were proved:—

The plaintiffs are merchants at Pernambuco, and the defendant is engaged in business at Liverpool. On the 8th of March, 1866, the defendant, who had on previous occasions bought cotton from the plaintiffs, wrote them the following letter:—"I beg to confirm my letter of 23rd February, and hope you will have executed fully all the cotton ordered, and consider still in force. If executed, please regard this as a new order for 100 more, at extreme limit 17$\frac{7}{8}$*d.* for Pernam or Paraiba Firsts, and 100 Bahia at 17$\frac{3}{8}$*d.* good, fair, and in each case the same quantity additional for each halfpenny down in price. Maceios are not desirable, unless at 2$\frac{1}{2}$*d.* or 3*d.* below, say about 15*d.* I shall be greatly disappointed if I get no cotton at these prudent limits. I congratulate myself on reducing on 8th January to 17$\frac{1}{2}$*d.*, avoiding losses." On the 17th of March, the defendant sent a telegram (which was afterwards confirmed by letter) repeating the order, and altering the maximum limit for Pernam and Paraiba cotton to 19*d.* per lb.

In conformity with this order, the plaintiffs bought, in the market at Pernambuco, on the defendant's account, 100 bales of Paraiba cotton, ninety four being Paraiba firsts, and six being Paraiba seconds. On the 12th of April, they gave notice by letter to the defendant of this purchase, and of the shipment of the goods. In the letter they stated that six of the bales were "seconds," and requested the defendant, if he did not want them, to hand them over to Messrs. Samuel Johnston & Co., of Liverpool [the plaintiffs' Liverpool house], who would pay the invoice cost. Meanwhile, there having been a heavy fall of prices in the Liverpool market, the defendant had written on the 7th of April to the plaintiffs, reducing his limits 3*d.* per lb., and also directing them, if any cotton above 17$\frac{1}{2}$*d.* had been bought on his account, to resell the same upon the spot, at least possible loss, and to cancel all his orders to that date for cotton and sugar. The letter continued thus:—"I will write by next mail, when I hope to be able to fix a maximum price for cotton. In the meantime, I hope and trust you have not effected any purchase on account of yours, &c." On the 23rd of April, the defendant again wrote to the plaintiffs, reiterating the

1867

JOHNSTON v. KERSHAW.

instructions contained in the letter of the 7th, and fixing, in the event of a panic in the market, a fresh maximum for 100 bales of Paraiba firsts. The plaintiffs, on the 28th of April, in acknowledging the receipt of the letter of the 7th, stated, with reference to the defendant's request to sell any cotton they might have bought on his account on the spot, that they were unable to comply with his instructions in that respect, as the only order they held for him was for the 100 bales already shipped.

The plaintiffs drew a bill on the defendant for the price of these 100 bales, which was presented at maturity to him for payment. He refused, however, to pay it. The plaintiffs thereupon brought this action. No direct evidence was given of the state of the market at Pernambuco, nor as to whether it would have been possible for the plaintiffs to have bought the whole 100 bales of "firsts" at the time they bought the ninety four.

Under these circumstances, a verdict was entered for the plaintiffs for the price of the 100 bales, the value of the six bales being taken according to the proportion in the invoice that had been sent with the goods. Leave was reserved to move to enter a verdict for the defendant, on the ground that, on the facts proved, the plaintiffs were not entitled to recover, and that there was no evidence to go to the jury in support of any of the counts of the declaration: or to reduce the damages by the value of the six bales of "seconds."

A rule having been obtained accordingly,

Quain, Q.C., and *Benjamin*, shewed cause. (1) The defendant is bound to pay for as many bales of the proper quality as were bought on his account. The transaction is one of agency, and therefore not governed by the same rules as a transaction between vendor and vendee. The principles governing the case are those laid down in Story on Agency, s. 170: "The principal is not bound by the unauthorized acts of his agent, but is bound where the authority is substantially pursued, or so far as it is distinctly pursued. But the question may often arise whether, in fact, the agent has exceeded what may be deemed the substance of his authority. Thus, if a man should authorize an agent to buy one hundred bales

(1) The liability of the defendants to take the six bales was not insisted on.

of cotton for him, and he should buy fifty at one time of one person, and fifty at another time of a different person; or if he should buy fifty only, being unable to purchase more at any price, or at the price limited, the question might arise whether the authority was well executed. In general it may be answered that it was; because in such a case it would ordinarily be implied, that the purchase might be made at different times, of different persons, or that it might be made of a part only, if the whole could not be bought at all, or not within the limits prescribed." Here there is no direct evidence that the plaintiffs had done all they could in buying ninety four bales, but there are materials enough to shew that they were unable to do more. In *Ireland* v. *Livingston* (1) the defendant was held liable under almost exactly similar circumstances to the present. There has been a *substantial* compliance with the terms of the order; and even granting it was not strictly executed, the defendant's subsequent conduct as shewn by the correspondence amounts to a ratification. With regard to the form of the declaration, the count for money paid at all events will certainly lie.

Jones, Q.C., in support of the rule. The order is on the face of it for 100 bales, neither more nor less; and in order to entitle the plaintiffs to maintain that it means "*up* to 100," they should have given evidence as to the usage of the market at Pernambuco, as was done in *Ireland* v. *Livingston*. (1) As the case stands there is nothing to shew that a purchase of anything but the exact number of 100 bales was contemplated by the defendant, or would be considered a performance of the order. The transaction ought not to be treated as one of agency entirely, but as of sale; and regarding it in that view it could scarcely be contended that the vendee would be bound to take a part only of the goods ordered by him.

KELLY, C.B. I am of opinion that the plaintiffs are entitled to our judgment. The question for our consideration turns entirely upon the meaning to be placed upon an order from the defendant to the plaintiffs, contained in a letter dated the 8th of March, 1866, in these terms:—"I beg to confirm my letter of 23rd of

(1) Law Rep. 2 Q. B. 99.

1867

JOHNSTON v. KERSHAW.

February, and hope you will have *executed fully* all the cotton ordered, and consider still in force. If executed, please regard this as an order for 100 more." Then follows a description of the sort of cotton required, and limitations as to price. Now the question is, whether this letter necessarily means an order to purchase 100 bales of cotton *at once*, in one and the same purchase, or whether it may not mean an order to buy these 100 bales in such manner, and at such times, as the agent might find practicable, having regard to the state of the market. I regret that there is no direct evidence before us of what the state of the market was at Pernambuco, as was the case in *Ireland* v. *Livingston*. (1) There is, however, in my judgment, enough in this case apparent, from the defendant's language and conduct, to enable us to collect that the state of the market was not such as to admit of the whole 100 bales being purchased at one and the same time. I consider that we have materials for inferring that the mode of executing the order contemplated by the parties was, that the agents at Pernambuco should go into the market and buy the bales ordered, in such minor quantities as they might find convenient or practicable. If they could at one time have obtained all the 100 bales, it would have been their duty to have done so. But we may fairly conclude from their conduct that they could not. They actually bought ninety four. Surely they would, if they could, have bought the remaining six. Not being able to buy them, were they to leave the order altogether unexecuted? Rather it was their duty, and was, I think, contemplated by the defendant, that they should buy as many bales as they could get, and make up the total number as soon as practicable.

The view I take of the meaning of the order is confirmed by the reference to the order of the 23rd of February contained in the letter of the 8th of March. That order was, it appears (2), also for 100 bales of cotton, and the defendant in his letter expresses a hope that it had been "fully executed." Here, then, is a direction by the defendant to his agent at Pernambuco to buy "100 bales

(1) Law Rep. 2 Q. B. 99.

(2) The order had not been put in evidence at the trial, but it was stated to the Court, during the argument, and admitted on both sides, to have been an order for 100 bales.

more," if the agent had "fully executed" the previous order, *i.e.* if they had already bought 100. That implies a notion on the part of the defendant that very likely his agents had not "fully executed" the previous order, *i.e.* had only bought as many of the 100 as they could get. I think, therefore, that, although we have no *direct* evidence on the point, there is sufficient evidence to shew that the state of the market at Pernambuco was such as to render it impossible for the plaintiffs to purchase the 100 bales all at once, and that the parties to the transaction must have understood that the purchase was to be made, if necessary, in several minor quantities. The whole question, it is true, turns on the meaning of the order, but that must be taken with reference to the state of the market for which it was given.

Under these circumstances, I think that this rule should be discharged. I may add that it is very satisfactory to find that our judgment is in accordance with the proposition cited during the argument from Justice Story's work on Agency. (1)

MARTIN, B., concurred.

CHANNELL, B. I am of the same opinion, but I desire to add one or two remarks on some of the points raised in this case. With regard to the declaration, it is unnecessary to decide whether the count for goods bargained and sold would lie. It is enough that there is a count for money paid. With regard to the main question, I also regret that we have no evidence of the usage of the market at Pernambuco before us. But because we have no such evidence in a specific shape, it by no means follows that we have not materials enough to enable us to judge what the usage of the market is. The language of the order of the 8th of March, and the letter of the 7th of April directing a sale "upon the spot," in my opinion shew the plaintiffs' interpretation to be right. I may add that the observation of Justice Story (1), which has been referred to, seems to me replete with common sense, and I make it the basis of my judgment. I am, therefore, of opinion that this order must not be taken as an order to buy 100 specific bales of cotton at one time, but that the plaintiffs by purchasing

(1) s. 170.

1867

JOHNSTON v. KERSHAW.

ninety-four bales have executed it with due and reasonable diligence. The rule must, therefore, be discharged.

PIGOTT, B., concurred.

Rule discharged.

Attorneys for plaintiffs: *Chester & Urquhart, for Lace, Banner, & Co., Liverpool.*

Attorney for defendant: *W. Pitman, for John Holden, Liverpool.*

Jan. 16.

COOPER, APPELLANT *v.* WOOLLEY, RESPONDENT.

Construction—Smoke—Towns Improvement Clauses Act, 1847 (10 *&* 11 *Vict. c.* 34), *s.* 108.

The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 108, imposes a penalty on persons so negligently using a furnace as not to "consume the smoke" arising from it.

The Birmingham Improvement Act, 1851 (14 & 15 Vict. c. xciii.), s. 55, incorporates the above section, but provides that the words "consume the smoke" shall not be in all cases read as "consume *all* the smoke;" and that the penalty may be remitted if the person summoned under that section has so constructed or altered his furnace as to consume *as far as possible* its smoke, "and has carefully attended to the same, and consumed *as far as possible*" its smoke.

On an information against the appellant for so negligently using his furnace as not to consume its smoke, it was not shewn that the furnace was improperly constructed; it was found that it was capable of consuming more smoke than it in fact did; but that to use the means provided for that purpose would render it impossible to carry on the appellant's trade with that furnace. The appellant was convicted:—

Held (assuming the furnace to be properly constructed), that "as far as possible" meant as far as possible consistently with carrying on the trade in which the furnace was employed; and that the appellant was wrongly convicted.

CASE stated under 20 & 21 Vict. c. 43, by the police magistrate of Birmingham, on convicting the appellant, under the Towns Improvement Clauses Act, 1847, s. 108, for so negligently using his furnace as not to consume its smoke.

The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 108, provides that, in places to which the act applies, all furnaces made after the passing of the special act shall be so constructed as to consume their own smoke, and all existing furnaces shall, within

two years after the passing of the special act, be altered so as to consume their own smoke; and that if after such period any person shall use a furnace not so constructed, or if, after the passing of the special act, any person shall use a furnace constructed since the special act, and not so constructed, or shall "so negligently use any such furnace as not to consume the smoke" thereof, such person shall be liable to a penalty of 40*s*.

The Birmingham Improvement Act, 1851 (14 & 15 Vict. c. xciii.), s. 55, incorporates the above section, but provides that the words "consume the smoke," shall not be held in all cases to mean "consume all the smoke," and that the penalties may be remitted by the justice or justices, if he or they shall be of opinion that the person summoned has "so constructed or altered his furnace as to consume *as far as possible* all the smoke" thereof, "and has carefully attended to the same, and consumed *as far as possible* the smoke" arising from it.

The appellant's furnace (which was of the kind called a muffle) was used for annealing bars of copper and brass, which were intended to be converted into wire. It was so constructed as to consume its smoke, and it was proved that the quantity of smoke emitted by it might be materially reduced by the regular admission of the external air, either by partially keeping open the door of the fireplace, or by a ventilator, actually attached to the under surface of the furnace, but not used. On the other hand, evidence was given, and the magistrate found as a fact, that if the external air were so admitted, the temperature of the interior of the furnace would not be uniform, and that the process of properly annealing the metal for the purpose of making wire would be rendered impossible in the furnace used by the appellant. It was contended that the meaning of the words "as far as possible" in the Birmingham Improvement Act, 1851, s. 55, meant "as far as possible consistently with the due carrying on of the trade;" but the magistrate did not adopt that construction, and convicted the appellant.

Mellish, Q.C. (*Beresford* with him), for the appellant, contended that the qualification of the special act would have no effect unless it were so construed; and that to treat the appellant's use as negli-

1867

COOPER v. WOOLLEY.

gent, when any other mode of using the furnace would make his trade impossible, would be to prohibit the exercise of the trade entirely.

Keane, Q.C. (*Dugdale* with him), for the respondent, contended that the words must be interpreted strictly; that the statements in the case only amounted to saying that the trade could not be so profitably carried on otherwise, and that this circumstance was of no importance compared with the sanitary objects aimed at by the acts; and that even if the trade were rendered impossible by upholding this conviction, the opposite conclusion would only be arrived at by importing words into the statute, which the Court had no power to do.

Mellish, Q.C., was not called on to reply.

KELLY, C.B. The conviction must be quashed. The information is laid against the appellant under the 108th section of the Towns Improvement Clauses Act, 1847, for so negligently using his furnace as not to consume the smoke. If that section stood alone, he would, perhaps, be liable to the penalty it imposes, but it is qualified by s. 55 of the special act, which provides that the words "consume the smoke" shall not mean in all cases "consume *all* the smoke," and remits the penalties, if the furnace is so constructed as to consume *as far as possible* all the smoke arising from it, and if the defendant has carefully attended to it, and has consumed the smoke *as far as possible*. It is to be collected from the case as stated, that the furnace in question is so constructed as to leave some of the smoke unconsumed, and that the consumption of the whole of the smoke can only be provided for in the mode and with the consequences pointed out; nor is any negligence shewn in the appellant's use of it, except in the omitting to consume the smoke in this mode. Now it appears that if the external air were so admitted, the temperature would not be equal, and the process of annealing would be impossible. The effect, then, of the case is, that it would be impossible for the appellant to carry on his trade at all with this furnace, if it were made to consume the whole of the smoke. We must take it, therefore, that the furnace is constructed to consume, and has consumed, as much smoke as can be consumed consistently with carrying on the appellant's trade; and the ques-

tion is, whether the appellant has "consumed as far as possible the smoke arising from it" within the meaning of the special act. Now, I apprehend these words mean, "as far as possible, consistently with carrying on the trade in an ordinary manner, and with a careful use and management of a properly constructed furnace." Construing them in this manner, and applying them to the facts as already stated, the appellant appears not to have transgressed the rule of the statute. No question arises as to whether the furnace is a nuisance: if it is, the appellant may be indicted; but we have only to decide whether he has violated the words of the statute under which he is charged.

CHANNELL, B. I am of the same opinion. The appellant is not charged by this information with not having so constructed his furnace as to consume its own smoke, but with the negligent use of a furnace, which we must suppose not to be faulty in its construction. The magistrate has in form found that there was negligence, but we are asked to determine, as a question of law, whether, on the facts stated, there was negligence within the meaning of the acts referred to; and I am of opinion that there was not. It was properly argued, that it is not sufficient for the appellant to say that it is for the benefit of his trade to conduct it in this mode. If the introduction of the air in the way pointed out would merely have made the process more slow or more costly, and so interfered with the profits of his trade, I am by no means satisfied that Mr. Keane's argument would not be right. But I draw from the case the inference, that the introduction of the air in this mode would render the manufacture of wire by this process altogether impossible. Now this is not a new process introduced for the purposes of obtaining a cheaper production, but its use was long anterior to the passing of either of the acts in question. Assuming this process, then, to be the ordinary mode of manufacturing wire, I am of opinion that, to bring the case within the acts, some other negligence must be shewn than that which consists merely in not adopting a plan, which would make the manufacture of wire by means of that process impossible.

PIGOTT, B. I am of the same opinion. Taking the two acts together, the penalty is not to be inflicted if the furnace in question

1867

COOPER v. WOOLLEY.

is so constructed, and so used, as to consume as far as possible its own smoke. Here there is no complaint of the furnace being improperly constructed; if it were so in fact, the appellant might have been charged in a different form. But on the facts stated we must take the contrary to be true, and, assuming this, there can clearly be no negligence in the appellant's use of the furnace, when there is no other mode of using it so as to carry on the trade except that which he adopted.

Conviction quashed.

Attorney for appellant: *J. Webb.*
Attorney for respondent: *T. Stanbridge.*

Jan. 17.

FEW *v.* PERKINS AND OTHERS.

Landlord and Tenant—General Covenant to Repair—Covenant to Repair after Notice—Effect of Notice—Forfeiture, Waiver of.

4 Ex. 226
1 C. & D. 133.

An indenture of lease, with a clause for re-entry, contained a general covenant on the part of the lessee to keep the premises demised in repair, and a further covenant that he would, within three months after notice being given to him by the landlord, repair all defects specified in the notice. The premises demised being out of repair, the landlord gave the lessee notice to repair, "in accordance with the covenants" of the lease. Before the expiration of three months, ejectment was brought:—

Held, that the notice was not a waiver of the forfeiture incurred by the breach of the general covenant to repair, and that the action was maintainable.

EJECTMENT for a house and premises called the "Jolly Sailor," at Norwood, in the parish of Croydon, Surrey. At the trial before Willes, J., at the Surrey summer assizes, 1866, it appeared that by an indenture dated the 18th of July, 1835, William Saxby had demised the "Jolly Sailor" for thirty-five years to Sir Henry Meux, Bart., and Henry N. Smith, then being brewers and co-partners in trade. The plaintiff had afterwards purchased the reversion from trustees under Saxby's will; the defendant Perkins was undertenant in possession, and the other defendants were the present partners in the brewery, in whom the lease had become vested, and who appeared to defend as landlords. The lease contained, in addition to the general covenant to keep in repair, the following clause: "It shall and may be lawful to and for William Saxby, his heirs

1867

FEW v. PERKINS.

and assigns, twice or oftener in every year, during the said term, at all seasonable times in the day, to enter upon the tenement and premises hereby demised, or any part thereof, to view, search, and see the state and condition thereof, and of all decays, defects, and wants of reparation and amendment, which upon every such view or views shall be found, to give or leave notice or warning, in writing, at or upon the said demised premises, unto or for the said Sir Henry Meux and Henry N. Smith, their executors, &c., to repair and amend the same within three calendar months then next following, within which said time or space of three calendar months next after every such notice or warning shall be so given or left, as aforesaid, they, the said Sir Henry Meux and Henry N. Smith, for themselves, their executors, &c., do hereby covenant with the said William Saxby, his heirs, &c., to repair and amend all such decays, defects, and wants of reparation and amendment accordingly." There was also a clause for re-entry on breach of any of the covenants in the lease.

On the 22nd of January, 1866, the plaintiff sent a letter to Perkins, in these terms: "I beg to hand you a specification for works to be done at the 'Jolly Sailor.'" Enclosed in the letter was the specification. On the 29th of January the plaintiff sent the following notice to the lessees, Messrs. Meux & Co.: "I hereby give you notice to repair the house and premises called the 'Jolly Sailor,' South Norwood, in accordance with the covenants in a lease granted by Mr. William Saxby to Sir Henry Meux, Bart., and others, dated 18th of July, 1835, and I have left the specification with Mr. Perkins, at the 'Jolly Sailor,' for that purpose." On the 27th of April, before the expiration of three calendar months from the giving of this notice, the premises still being, as the plaintiff alleged, out of repair, this action was commenced. Two days previously the plaintiff had received the rent due up to the 25th of March. Under these circumstances a verdict was entered for the plaintiff, with leave to move to enter it for the defendants, on the ground that the giving of the notice of the 29th of January was a waiver of the forfeiture.

A rule having been obtained accordingly,

Denman, Q.C., and *Shaw*, shewed cause. The covenants in the

1867

FEW v. PERKINS.

lease are independent, and the landlord may rely on either: *Baylis* v. *Le Gros*. (1) The notice given was in general terms, and not as in *Doe* d. *Morecraft* v. *Meux* (2), a notice to repair "within three months." It calls upon the lessees to repair, "in accordance with the *covenants*." The landlord thus shews an intention to rely on all his rights under the lease. The case is similar to *Roe* ex. d. *Goatly* v. *Payne*. (3)

[CHANNELL, B. In *Doe* d. *Morecraft* v. *Meux* (2), rent was paid and received, as here, between the giving of the notice and the ejectment. It may, perhaps, have been considered that the receipt of rent was a waiver of the forfeiture. According to the judgment of Bayley, J., in that case, that circumstance seems to have influenced the decision.]

The forfeiture is a continuing one, so that the receipt of rent is immaterial. Moreover, the only act of waiver relied on in this case is the giving of the notice.

Garth, *Q.C.*, and *Thesiger*, in support of the rule. The notice of the 29th must be construed with reference to that of the 22nd, which was only invalid because directed to the under-tenant, and clearly applied to the restricted covenant in the lease alone. *Roe* ex. d. *Goatly* v. *Payne* (3) is distinguishable. There the notice was to repair *forthwith*, and was therefore applicable, on the face of it, to the general covenant.

[KELLY, C.B. The notice here is to repair "in accordance with the *covenants*," in the plural.]

Upon a true construction of it, nevertheless, it is not clearly and unequivocally a general notice, and in case of doubt it should be construed against the landlord.

KELLY, C.B. I am of opinion that this verdict should not be disturbed. The lessee has in his lease covenanted generally to keep the premises in repair, and in case of his committing a breach there is a condition for re-entry by the lessor. There is also in the lease a proviso or covenant that the lessor may enter to inspect the premises, and in case he should find them out of repair, give notice to the lessees to repair within three

(1) 4 C. B. (N.S.) 537. (2) 4 B. & C. 606.
(3) 2 Camp. 520.

months. These being the terms of the lease, the lessor gave two notices. The first could not be relied on, because it was not properly directed. The second was accordingly given, and required the lessees to repair the premises, "in accordance with the covenants" of the lease. This notice having been given, the repairs, we must take it for the present purpose, were not effected, and ejectment was brought. It is contended on the part of the defendants that the notice must be taken to refer to the second covenant to repair, and that the landlord was bound to continue the tenancy for three months after giving it. I cannot assent to that proposition. The case of *Doe* d. *Morecraft* v. *Meux* (1) does not apply to this case, for there the notice was specific to repair "within three months." If, therefore, it had been held to apply to the general covenant, it would have deluded the tenant. But here the notice is general in its terms, and similar to that which in *Roe* ex. d. *Goatly* v. *Payne* (2) was held to have no effect on the right of entry for a breach of the general covenant. The only difference between the two cases is, that here the notice is general, "to repair in accordance with the covenants;" there it was to repair "forthwith," agreeably to the covenant in the lease. But a notice to repair generally is, in effect, a notice to repair as soon as may be—forthwith, or in a reasonable time. Both notices have the same legal effect. I regard this, therefore, as the ordinary case of a general covenant in a lease, with a proviso for the landlord to enter in the event of a breach. He has pursued the usual, though not necessary, course of giving his tenant notice to repair. But he does not thereby lose his right of entry if the repairs are not effected by the tenant.

CHANNELL, B. For the purposes of this argument it is admitted that the premises are out of repair. That circumstance makes a primâ facie case of forfeiture under the covenants of the lease. The question is, whether that forfeiture was waived, and the answer depends on the covenants in the lease, and the terms of the notices to repair. Taking the dicta of Bayley and Holroyd, JJ., in *Doe* d. *Morecraft* v. *Meux* (3) as correct, I do not

(1) 4 B. & C. 606. (2) 2 Camp. 520.
(3) 4 B. & C. at pp. 609, 610.

1867

FEW v. PERKINS.

think they apply to the facts of the present case. I am of opinion that there has been no waiver of the forfeiture, and that this rule should therefore be discharged.

PIGOTT, B. I am of the same opinion. I do not think the notice of the 29th of January amounted to a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair.

Rule discharged.

Attorney for plaintiff: *S. W. Johnson.*
Attorneys for defendants: *Hunter, Gwatkin, & Hunter.*

Jan. 21.

SOWERBY *v.* COLEMAN AND OTHERS.

Custom—Unreasonableness.

A custom for inhabitants of a parish to exercise and train horses at all seasonable times of the year, in a place beyond the limits of the parish, is bad.

DECLARATION, for trespass with horses in land of the plaintiff called Lilley Hoo, in the manor of Lilley.

Second plea: an immemorial custom in the manor of Lilley, for the inhabitants of the parish of Lilley, in and adjacent to the said manor of Lilley, by themselves and their servants by their command, to enter at all seasonable times of the year, at their free will and pleasure, into and upon the said land, for the purpose of exercising and training horses thereon; averring that the defendant Coleman was an inhabitant of the said parish, and that Coleman, being such inhabitant, and the other defendants, as his servants and by his command, on divers days and times, being seasonable times of the year, broke and entered the said land of the plaintiff for the purpose of training and exercising the horses of the defendant Coleman, doing no more damage than was necessary, which were the trespasses complained of.

Demurrer and joinder.

Third plea: in the same words as the second plea, except that it claimed the customary right for the inhabitants of the hundred of

Hitchin and Pirton, in and adjacent to the said manor, and justified the trespass accordingly.

Demurrer and joinder.

Archibald (*Sir G. Honyman, Q.C.*, with him), in support of the demurrer. The alleged custom is bad, for it offends against almost all the rules laid down with respect to customs in the *Case de Tanistry* (1) and elsewhere, and which are collected in Broom's Leg. Max., 883-8, 4th ed. First, a custom is a local law, and can only operate within the limits of the place where it obtains; here, however, the custom averred is a custom "in the manor of Lilley," but the parish for whose inhabitants it is claimed is described as "in *and adjacent* to" the manor. The case is therefore within the anonymous case in Dyer, p. 363, pl. 27, with which agrees the doubt implied in the question of Littledale, J., in *Blewett* v. *Tregonning*. (2) The only cases in which a right in the inhabitants of one parish to use the soil of another parish has been upheld are cases of necessity or public convenience, or where some consideration is given to the owner of the soil. Secondly, this custom is unreasonable. It amounts to a claim of a profit à prendre, or is at least within the reason on which such a custom is disallowed, for it excludes the owner of the soil from any beneficial use of it, and that without compensation: *Gateward's* case. (3) This is clearly so, if the words "seasonable times" are excluded, and those words put no clear limitation on the use. But, thirdly, these words themselves make the custom uncertain—it does not appear whether they mean seasonable for the land or seasonable for the horses, nor in either case is seasonable a word of definite meaning. Fourthly, the custom is wanting in continuance: it is a custom only for the benefit of those inhabitants who have horses to train, and there might be none such: *Selby* v. *Robinson*. (4)

The Court then called on

Coleridge, Q.C. (*H. Lloyd* with him), to support the plea. It is admitted that a custom to a profit à prendre is invalid, on the ground stated by Lord Campbell in *Race* v. *Ward* (5), viz. that

(1) Davy, 29.
(2) 3 A. & E. at p. 572.
(3) 6 Co. 59 b.
(4) 2 T. R. 758.
(5) 4 E. & B. 702; 24 L. J. (Q.B.) 153.

1867

SOWERBY v. COLEMAN.

the whole beneficial use of the owner might be destroyed by such a usage. But here no such right is claimed, and *Gateward's* case (1) and *Selby* v. *Robinson* (2) have therefore no application. The custom is to a mere easement, and is similar to those which were allowed in *Abbot* v. *Weekly* (3) and *Fitch* v. *Rawling*. (4) The custom is not uncertain or wanting in continuance, because the persons entitled to use it may be sometimes practically unable to do so; it is sufficient if their title is defined. Neither is it rendered uncertain by the limitation to seasonable times, for the Court will determine, either with or without a jury, whether the time is seasonable, as was done in *Bell* v. *Wardell* (5), where a custom over arable land, at seasonable times, was held not to have been followed in riding over the land when corn was standing upon it. Here the plaintiff might have replied that the time when the trespass was committed was not a seasonable one, and issue might have been taken upon that fact.

[KELLY, C.B. Is there any instance of such a custom as this having been successfully maintained, on behalf of the inhabitants of one parish, to be exercised in another parish?]

In *Mounsey* v. *Ismay* (6) a custom for the freemen of Carlisle to hold races on a close in the neighbourhood of the city on Ascension Day was successfully pleaded; and in *Tyson* v. *Smith* (7) a custom was allowed for *all* victuallers to erect booths at an annual fair, on making a nominal payment to the owner of the soil.

KELLY, C.B. I think these pleas cannot be supported. It was contended, and, but for the exception limiting the exercise of the alleged right to seasonable times, it would perhaps have been rightly contended, that a custom of this nature would be invalid, on the same ground on which a customary right to a profit à prendre is disallowed; for, the effect of a constant use by all the inhabitants of a parish of unknown extent over a piece of ground the extent of which is also unknown, might, and probably would, deprive the owner of all beneficial enjoyment of the soil.

(1) 6 Co. 59 b.
(2) 2 T. R. 758.
(3) 1 Lev. 176.
(4) 2 H. Bl. 393.
(5) Willes, 202, at p. 206.
(6) 1 H. & C. 729; 32 L. J. (Ex.) 94.
(7) 9 A. & E. 406.

The limitation to seasonable times would no doubt, in the case of arable land, introduce a qualification which might bring the case within the authorities cited. There is no allegation, however, that the land in question is arable. But the ground on which I put my judgment, and which is, I think, conclusive of the question, is that this, being a custom of the nature above described, is claimed on behalf of all the inhabitants of one place, to be exercised and enjoyed in another and a different place. During the argument I put to the learned counsel for the defendant a question similar to that put by Littledale, J., in *Blewett* v. *Tregonning* (1): "Is there any instance where the inhabitants of one parish have established a claim to the exercise of such a right in another parish?" and I have received no satisfactory answer to that inquiry. One or two cases have indeed been cited which apparently conflict with our present decision, but they are not, in fact, opposed to it. One is the case of *Mounsey* v. *Ismay* (2), where the inhabitants of Carlisle successfully claimed a right to use a close in the neighbourhood of the city as a racecourse on a single day in the year. Another such case is *Tyson* v. *Smith* (3), where a custom of wide extent was sustained, on payment of a consideration to the owner of the soil, to use his soil for the erection of booths at a fair held during a few days in the course of the year. In these cases a custom was sustained, by which the owner of the soil was in fact restrained from any beneficial use of it for the time during which the right was exercised, but in neither case did this exclusion continue for more than a few days. The present case is totally different. Here all the inhabitants of the parish claim the right to go into the land of another person, and to use it for the purpose of exercising and training horses, at all "seasonable times" of the year; and construing that phrase, in conformity with *Bell* v. *Wardell* (4), to exclude the time when corn is growing on the land, yet, if the land be not arable, the exception is annihilated, and the right universal. Such a right, then, to exercise an indefinite number of horses, for an indefinite period of the year, would exclude the owner from the beneficial occupation of his property during probably the whole

(1) 3 A. & E. at p. 572.
(2) 1 H. & C. 729; 32 L. J. (Ex.) 94, 9 Jur. (N.S.) 306
(3) 9 A. & E. 406.
(4) Willes, 202.

1867

SOWERBY v. COLEMAN.

year, and cannot be sustained on behalf of a parish or district beyond the limits of the place where it is to be exercised. I will only add that a comparison of the second and third pleas shews the evil consequences which would flow from admitting the extension of such a right to inhabitants of another district. The claim tends to widen its extent, and, if held valid in the smaller division, might spread in the course of time to the neighbouring hundred, or even to the neighbouring county.

CHANNELL, B. I am of the same opinion. No substantial distinction has been pointed out between the second and third pleas, and the same judgment applies to both. I do not base my opinion on the ground that this amounts to a profit à prendre; I doubt whether it does. Nor, again, do I say that, if a compensation were made to the owner, the right might not be legally claimed; but I rest my judgment on the fact that the right, being of the kind already described by the Chief Baron, is claimed on behalf of the inhabitants of a parish to be exercised in a place not within the parish. If there were an allegation in the plea that the parish and the manor were co-extensive, or that Lilley Hoo lay within the parish, the right might perhaps have been admitted; but there is no such allegation. Neither is the right claimed on behalf of the inhabitants of the parish of Lilley, so far as it lies within the manor of Lilley; but it is only said that Lilley Hoo is in the manor of Lilley, and that the parish is in and adjacent to the manor. I also doubt whether the plea is not open to another objection. The right is claimed to exercise and train horses generally. It is true that in the justification it is said that the horses with which the trespass was committed were the horses of the defendant, an inhabitant of the parish of Lilley; but to support the plea, we must see that the custom is properly laid in the commencement.

PIGOTT, B., concurred.

Judgment for the plaintiff.

Attorneys for plaintiff: *N. C. & C. Milne, for Hawkins & Co., Hitchin.*

Attorneys for defendants: *Dale & Stretton.*

PRIESTLEY *v.* PRATT AND ANOTHER.

1867
Jan. 22.

Bankruptcy Law Consolidation Act, 1849 (12 & 13 *Vict. c.* 106), *s.* 125—*Reputed Ownership—Custom.*

Where a custom exists for the buyer to leave goods bought in the hands of the seller, and is so notorious as to be practically known to all persons dealing with the seller in his business, goods so left in the hands of the seller for a time not longer than is clearly within the custom, do not on the bankruptcy of the seller pass to his assignees, under s. 125 of the Bankruptcy Law Consolidation Act, 1849.

SCL 520
526-7
532-3
QBL 622

TROVER to recover from the defendants, the assignees in bankruptcy of R. Grant, lambs and pigs, purchased by the plaintiff of the bankrupt before his bankruptcy.

At the trial before Mellor, J., at the Lincolnshire summer assizes, it appeared that the lambs and pigs, together with two steers, were bought on the 10th of July, 1865. The plaintiff paid for the whole, and removed the steers, but left the lambs, which were sucking, and the pigs, on the bankrupt's farm, until it should suit his convenience to remove them. On the 15th of July, Grant was made bankrupt on his own petition, and the assignees took and claimed to retain possession of the lambs and pigs, as in his order and disposition at the time of the bankruptcy.

Evidence was offered of a custom on the purchase of farm-stock to leave the animals bought upon the seller's premises, but the jury interposed, and said the evidence was unnecessary, for that there was a notorious usage and custom for the vendee of cattle to leave them in the hands of the vendor, for the convenience of the vendee, for a longer or shorter period, as might be arranged in each case.

Upon this a verdict was taken for the plaintiff for 49*l.*, with leave to the defendants to move to enter a verdict for them, on the ground that the animals were in the order and disposition of the bankrupt at the date of his bankruptcy.

A rule having been obtained accordingly,

Wills (*Digby Seymour, Q.C.*, with him), shewed cause. He contended that as the jury had found as a fact, that a notorious custom existed for the buyer to leave the animals bought in the hands of

1867

PRIESTLEY v. PRATT.

the seller, the case was within the decisions of *Re Terry* (1); *Prismall* v. *Lovegrove* (2); and *Watson* v. *Peache.* (3)

The Court then called on

Field, Q.C., to support the rule. He relied upon *Thackthwaite* v. *Cock* (4) and *Knowles* v. *Horsfall* (5), and contended that a custom so alleged amounted to a general custom of England, for buyers to leave goods in the hands of sellers, until it suited their convenience to remove them. The case of *Watson* v. *Peache* (3) was distinguishable, on the ground that the bankrupt there was in the position of hirer of the barges, and a custom was proved to hire barges, and for the hirer to use them with his own name painted on them. It was not, therefore, as purchaser of the goods, but as the person letting them out to hire, that the defendant was there protected; but the present case was merely one of the purchase of goods, and if decided in favour of the plaintiff would almost have the effect of nullifying the reputed ownership clause in all such transactions.

KELLY, C.B. This rule must be discharged. The question before us, and it is a question on which we have power to draw inferences of fact, is, whether we are to hold, upon the evidence given at the trial, that these animals were in the order and disposition of the bankrupt within the meaning of the Bankruptcy Act, 1849. That question depends in all cases on whether there is shewn to exist, with respect to the articles in question, any custom of trade, so notorious as practically to be known to all who do business with those dealing in such articles, and who are called upon to consider the question of giving credit to them, by virtue of which goods, in reality the property of others, are allowed to remain in the actual possession and physical power of disposition of the bankrupt. Looking at the circumstances of this case, it is difficult to imagine a stronger case of a notorious custom—notorious to all who are acquainted with the practice of farming. There is here no question of opposing evidence, but the jury themselves interpose in the course of the evidence, and

(1) 7 L. T. (N.S.) 370. 10 WR 517
(2) 6 L. T. (N.S.) 329.
(3) 1 Bing. N. C. 327.
(4) 3 Taunt. 487.
(5) 5 B. & A. 134.

1867

PRIESTLEY v. PRATT.

say that the custom is so notorious as to make the evidence unnecessary. On this finding it must be taken that the custom was known to all who might be prejudiced by the apparent ownership; and that any one who was about to give credit to a farmer would not take it for granted that all the cattle he saw upon the farmer's land were his own, and give credit on that footing, but, conjecturing that they might be the property of others, would exercise a corresponding caution. Two cases were cited to us of *Thackthwaite* v. *Cock* (1), and *Knowles* v. *Horsfall*. (2) The former of these is not an authority which could weigh for a moment as an argument against our present decision; for there was there no custom openly and expressly found by the jury to be notorious, but, on the contrary, as was observed by the Chief Justice (3), there was no satisfactory evidence of a usage countervailing the operation of the statute. The case of *Knowles* v. *Horsfall* (2) is stronger, and entitled to much consideration; but the decision is there put chiefly on the ground that there was no notice to the world, nothing to induce persons to suppose or conjecture that the brandy in question might be the property of some other person than the bankrupt; and that to take the case out of the operation of the statute, some evidence must be given to satisfy the jury that the property may well be supposed to belong to some third person. It is to be observed that the learned judges in that case refer to the custom as known only in the wine trade at Liverpool; they do not even speak of a custom notorious in the trade generally to leave goods purchased for a greater or less time in the hands of the vendor. We must then suppose that such a state of circumstances as we have before us was not present to their minds, or that the facts did not warrant the conclusion, that there existed any such notorious custom as is here proved. If, however, we were to suppose such a notorious custom to have been satisfactorily proved, we should have to consider whether that decision is not opposed to the whole course of recent authority. Without relying on *Re Terry* (4) in the Bankruptcy Court, although that case was decided by a very learned person, of great experience in this branch of the law, the case of *Prismall* v. *Lovegrove* (5), in

(1) 3 Taunt. 487. (2) 5 B. & A. 134.
(3) 3 Taunt. at p. 491. (4) 7 L. T. (N.S.) 370. (5) 6 L. T. (N.S.) 329.

1867

PRIESTLEY v. PRATT.

conformity with other modern cases, establishes, that wherever a custom exists so notorious that it may be presumed to be known to all persons engaged in the business, that the buyer should leave the goods bought in the hands of the seller for a certain time, and they are not left for a longer time than is clearly within the custom, they are taken out of the reputed ownership clause, and the buyer is entitled to recover them from the assignees in bankruptcy of the seller. The present case falls within that description, and the plaintiff is therefore entitled to recover.

PIGOTT, B. I am of the same opinion. A notorious custom has been clearly found for the buyer to leave the animals bought in the possession of the seller, and that being so, it appears to me to fall exactly within the description given by Mansfield, C.J., in *Thackthwaite* v. *Cock* (1), of the custom required to take goods out of the reputed ownership clause; it is "such a custom, that persons dealing with the traders may see and know that the goods may possibly not be the property of the possessor." As to *Knowles* v. *Horsfall* (2), I agree with the observations of the Chief Baron upon it; and I will add that at the time when that case was decided the struggle of the Courts was rather to give as much as possible to the assignee, than to discover the true owner.

Rule discharged.

Attorneys for plaintiff: *Rogerson & Ford, for Brown & Son, Lincoln.*

Attorney for defendants: *Glasier, for Williams, Lincoln.*

(1) 3 Taunt. at p. 491. (2) 5 B. & A. 134.

HOGGARTH *v.* TAYLOR.

1867
Jan. 23.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Deed under s.* 192—"*Creditor*"—*Unliquidated demand—Release.*

To an action for unliquidated damages for breach of contract by a wrongful dismissal of the plaintiff from the defendant's service, the defendant pleaded a deed under the Bankruptcy Act, 1861, s. 192, between the defendant (the debtor), two sureties, and the creditors of the defendant, by which the debtor and sureties covenanted to pay a certain composition in a specified time, the payment to be secured by joint and several promissory notes. In consideration of the premises, the creditors released the debtor "from their respective debts, and all claims and demands in respect thereof." The plaintiff did not assent to or approve of the deed:—

Held, that the plea was no answer to the action, the claim of the plaintiff being for unliquidated damages.

Woods v. *De Mattos* (Law Rep. 1 Ex. 91) distinguished.

DECLARATION. On an agreement in writing made on the 23rd of May, 1864, between the plaintiff and the defendant, whereby the plaintiff agreed with the defendant, for the consideration therein mentioned, that the plaintiff would for two years from the 25th of May serve the defendant as clerk in his business of contractor, and do all things pertaining to the office of clerk, and in consideration of the premises, the defendant promised the plaintiff to pay him 90*l.* a year during the period of two years, to provide him with a house rent free, to pay the rates and taxes incident thereto, and to instruct him in the business of a contractor. Averment of the performance of all conditions, &c. Breaches: first, that the defendant wrongfully dismissed the plaintiff before the expiration of two years; secondly, that he did not provide the plaintiff with a house rent free; thirdly, that he did not pay the rates and taxes incident thereto; and fourthly, that he did not instruct the plaintiff in the business of a contractor.

Plea: setting out verbatim the provisions of a deed dated the 13th of September, 1865, after the accrual of the plaintiff's claim, under s. 192 of the Bankruptcy Act, 1861, between the defendant (the debtor), R. Taylor and W. Taylor, and the creditors of the defendant, whereby the defendant, and R. Taylor and W. Taylor, jointly and severally covenanted with the creditors to pay them a

1867

HOGGARTH v. TAYLOR.

composition of 7*s.* 6*d.* in the pound by two instalments of 5*s.* and 2*s.* 6*d.*, to be paid at the expiration of six and twelve months respectively from the date of the deed, the instalments to be secured by the joint and several promissory notes of the defendant, and of R. Taylor and W. Taylor, bearing even date with the deed. And the creditors, in consideration of the premises and the covenant, released the defendant *from their respective debts, and all claims and demands in respect thereof*, except the said covenant and promissory notes. Averment of performance of all conditions necessary to make the deed as binding on all the creditors of the defendant as though they were parties thereto, and that the deed was as binding on the plaintiff as though he had been a party thereto.

Demurrer and joinder.

Replication, that although twelve months from the date of the deed had elapsed, no promissory notes had been delivered to the plaintiff, nor had any composition on the plaintiff's debts and claims been paid to him.

Demurrer and joinder.

[The ground of demurrer to the replication was that the release in the deed was immediate and absolute, and did not depend on the performance of the covenants contained in the deed. The decision of the Court, however, renders further notice of this point unnecessary.]

Quain, Q.C., in support of the demurrer to the plea, contended that the deed and the release contained in it were confined to debts, or claims in respect of debts, existing at the date of the deed, and for which promissory notes for liquidated sums could be then given.

The Court called on

R. G. Williams to support the plea. First, the deed is entered into between the defendant and his "creditors," and, according to *Woods* v. *De Mattos* (1), a "creditor" in s. 192 of the Bankruptcy Act, 1861, means any one who could prove, in case of a bankruptcy, against the bankrupt's estate. The present plaintiff could have proved, although his demand is for unliquidated damages. He

(1) Law Rep. 1 Ex. 91.

1867

HOGGARTH v. TAYLOR.

was subject in all respects to the jurisdiction of the Court of Bankruptcy (s. 197), and was *bound* to avail himself of the provisions of s. 153, which provides a machinery for the ascertainment of unliquidated claims: *Saunders* v. *Best.* (1) The plaintiff, therefore, was a "creditor" in respect of his whole claim, and as such, was bound by the deed. Secondly, the release is sufficiently general in its terms to include an unliquidated demand. It is true that the release is of "debts;" but that word must be interpreted in the extended sense indicated in the Bankruptcy Act, 1861, and therefore includes all claims, liquidated or unliquidated, which are proveable in case of a bankruptcy.

Quain, Q.C., was not called on to reply.

KELLY, C.B. There are several sections of the Bankruptcy Act, 1861, namely sections 192—198, which afford a certain degree of protection to debtors who execute and duly register a deed of the nature alleged in this plea. The certificate of registration is to operate for all purposes as a protection in bankruptcy, and there is also (s. 198), an express provision, that no "creditor"—and I am willing to interpret the word "creditor" in the widest sense—shall avail himself, without leave of the Court, of any execution against the debtor's property, or process against his person, after notice of the filing and registration of a deed under s. 192. There, however, the benefits conferred by the act cease. Whether a deed like the one now under discussion is pleadable in bar is another question. There are many actions, even for specific sums of money, where such a deed could not be so pleaded. Thus, it can only be so pleaded where it contains an absolute and immediate and unconditional release operating on the demand of the particular creditor who brings the action. Without such a release such a deed would not be a bar. Now in the present case it seems next to impossible to devise an argument which will support the plea. The action is brought for unliquidated damages for a wrongful dismissal. The deed only releases specific and ascertained debts, for which it is further provided that promissory notes are to be given. Except as to debts of that description the deed furnishes no answer. There is no release of claims which may perhaps afterwards be

(1) 17 C. B. (N.S.) 731; 10 Jur. N.S. 1104

1867

HOGGARTH v. TAYLOR.

converted into specific debts. Nor could promissory notes be given in respect of claims of that nature. I do not give any opinion as to whether or not there may be power after the execution of a deed like this to apply to the Court of Bankruptcy for the conversion of this demand into a debt, or as to whether the machinery applicable in case of a bankruptcy, can be applied here. But assuming that the plaintiff might become a "creditor," after adopting the process indicated in s. 153 of the act, still, until that process has been adopted, there is nothing on which a release in the terms contained in this deed can operate. I am therefore of opinion that the plaintiff is entitled to our judgment.

MARTIN, B. I am of the same opinion. The declaration is on an agreement whereby the defendant promised to employ the plaintiff as a clerk in his business for two years, and the principal breach alleged is, that the defendant wrongfully dismissed him before the expiration of that period. The transaction may have been an entry on the 25th of May, 1864, by the plaintiff in his employment, and a discharge on the next day, long before this deed was executed. To this cause of action a deed under the Bankruptcy Act, 1861, is set up as an answer; but I think the words used in it do not apply to this case. Whatever construction we may put on the act of parliament, we must construe deeds such as these, like all other deeds, by the usual rules of interpretation. Now this deed only deals in terms with the debtor and his creditors, in the ordinary meaning of the words. I wish to say nothing either for or against the decision in *Woods* v. *De Mattos*. (1) I regard that case as no authority for the present decision. We have to give effect to the deed according to its express provisions, and not to strain it to bring it within the alleged intention of the Bankruptcy Act. I think the plaintiff is entitled to our judgment.

CHANNELL, B. I am of the same opinion. I think that this plea is bad. It cannot be contended that it is an answer to this action unless it absolutely releases the plaintiff's claim; therefore, apart from the case of *Woods* v. *De Mattos* (1), the point would be

(1) Law Rep. 1 Ex. 91.

1867

HOGGARTH v. TAYLOR.

scarcely arguable. The release is of *debts* due to the defendant's creditors. As to the case of *Woods* v. *De Mattos* (1), that decision was, I think, correct, but it does not govern this case. There the Court had merely to ask whether, under the circumstances, the deed could be enforced; and there was no such difficulty as exists here. The action there was not like the action here, but was on a bill of exchange, and the plaintiff was a "creditor" to the amount of that bill, and not for any unliquidated sum. We can hold, consistently with that case, that this deed is not pleadable in bar.

PIGOTT, B. I am of the same opinion. Whatever construction may be placed on the term "creditor," the parties to this deed meant to do no more than to compound for specific debts. The release in the deed has no application to such a claim as is made by the plaintiff in this action.

Judgment for the plaintiff.

Attorneys for plaintiff: *Parker, Rooke, & Parkers.*
Attorneys for defendant: *Johnson & Weatheralls.*

BUTLER *v.* KNIGHT.

Jan. 22.

Attorney and Client—Compromise—Retainer—Negligence.

If the plaintiff in an action continues the authority of his attorney after judgment, by allowing him to proceed to obtain satisfaction, the attorney retains the power to bind his client by a compromise.

DECLARATION stating the retainer of the defendant as attorney for the plaintiff in an action of *Butler* v. *Ruffe*, and that judgment was recovered in that action for 300*l.* damages and 90*l.* costs.; that afterwards, and whilst the defendant was acting as such attorney for the plaintiff, he negligently and wrongfully omitted to enforce the judgment against Ruffe, and wrongfully and improperly, without the authority and consent, and against the will, and contrary to the directions of the plaintiff, agreed with Ruffe to accept 100*l.* in full satisfaction and discharge of the judg-

(1) Law Rep. 1 Ex. 91.

1867

BUTLER v. KNIGHT.

ment, and accepted the payment of the same, whereby the plaintiff lost the benefit of the judgment, and the benefit of the costs in the action, amounting to 105*l.*, which she paid to the defendant as her attorney in the said action.

Plea, not guilty, and issue thereon.

The cause was tried before Keating, J., at Stafford, at the last summer assizes, when it was proved that the present plaintiff had brought an action for breach of promise of marriage against one Ruffe, and retained the defendant to conduct it. That action was tried at Warwick, on the 12th of July, 1864, and a verdict was obtained for 300*l.*, on which judgment was signed on the 27th of July. The plaintiff gave no formal instructions to the defendant to continue to act as her attorney in enforcing the judgment; but immediately after the trial she directed him not to compromise the matter, and said that she would not shew Ruffe any clemency; she afterwards repeated the same instructions. The defendant, however, having reason to believe that Ruffe was in insolvent circumstances, and having with some difficulty obtained from Ruffe's brother the promise of 100*l.* for a compromise of the action, he on the 16th of August agreed to a compromise on these terms, and received the 100*l.* In this he acted apparently with the consent of the mother and brother-in-law of the plaintiff, with whom he principally communicated in the business relating to the action. But the plaintiff repudiated the arrangement, and refused to sign the satisfaction-piece, and now brought this action.

The defendant's counsel claimed a nonsuit, on the ground that if the defendant had authority to settle, there was no cause of action; and that if he had not, the plaintiff was not bound by the compromise. The case was left to the jury, who found that the defendant entered into the arrangement contrary to the plaintiff's directions, and gave a verdict for 50*l.*, if the plaintiff could still enforce her judgment against Ruffe, and for 300*l.* (giving credit for the 100*l.* received) if she could not enforce it.

A rule having been obtained, pursuant to leave reserved, to enter a nonsuit, or for a new trial on the ground that the verdict was against the weight of evidence, and that the damages were excessive,

1867

BUTLER v. KNIGHT.

Powell, Q.C., and *G. Browne*, shewed cause. There was clearly a cause of action; the defendant has acted contrary to his client's instructions, and this alone would entitle the plaintiff to nominal damages: *Fray* v. *Voules*. (1) But the damages ought to be substantial, for the injury suffered is real. Even supposing the plaintiff was not bound by the compromise entered into on her behalf, the jury have found that there was a loss of 50*l.* caused by the neglect to enforce execution. But, in fact, she was bound; the defendant was undoubtedly acting as her attorney in the negotiations with Ruffe and his brother, and no notice of any limitation of his authority was given to those with whom he was dealing. As attorney he had power to enter into a compromise on his client's behalf, and the plaintiff cannot, therefore, now enforce her judgment: *Chown* v. *Parrott* (2); *Prestwich* v. *Poley* (3); Lush Pr. 256, 3rd ed.; Vin. Ab. tit. Attorney (P.) pl. 6, 7, 8. Here again the jury have found as a fact, that the loss suffered by the plaintiff was (giving credit for the 100*l.* received) 300*l.*, or the full amount of the verdict, and this finding the Court will not disturb.

Huddleston, Q.C., and *Macnamara*, in support of the rule. It is an error to say that the defendant acted as the plaintiff's attorney in effecting the compromise. The retainer ceases at judgment. After that time the attorney cannot represent the client without a new authority, *Macbeath* v. *Ellis* (4); the client may, without any order to change attorneys, sue out execution by a different attorney from the one who has conducted the cause, *Tipping* v. *Johnson* (5); the attorney cannot sue out execution against his client's wish, *Barker* v. *St. Quintin* (6); his authority is not sufficient to entitle the sheriff to release the defendant from custody, *Savory* v. *Chapman* (7); nor can he release the debt or damages after judgment, 1 Roll. Abr. 291, tit. Attorney (M), pl. 2. The cases cited on the other side have, therefore, no application, because in both the compromise was made by the attorney in the course of the cause, and

(1) 4 E. & E. 839; 28 L. J. (Q.B.) 232.
(2) 14 C. B. (N.S.) 74; 32 L. J. (C.P.) 197.
(3) 18 C. B. (N.S.) 806; 34 L. J. (C.P.) 189.
(4) 4 Bing. 578.
(5) 2 B. & P. 357.
(6) 12 M. & W. 441.
(7) 11 A. & E. 829.

1867

BUTLER v. KNIGHT.

before judgment. The case of *Bevins* v. *Hulme* (1) is apparently opposed to the present contention, but the opinion of Parke, B., there expressed (2), is not supported by the authorities cited, and the decision was only that the declaration was bad for not averring the money to have been received by the defendant on his original retainer as attorney in the suit. The defendant's view is confirmed by Rule 80, Hilary Term, 1853, which requires the satisfaction-piece to be signed by the party himself: see Chitty, pp. 88, 722, 12th ed. But further, this rule of law must be taken to have been known to Ruffe, so as to give him notice that the defendant's authority was limited; it was not, therefore, necessary for the plaintiff to give him express notice, and she will not be bound as having held out the defendant as empowered to make the compromise. The compromise, then, is not binding on the plaintiff, and she has suffered no injury, but can now enforce her judgment; and it seems, according to the opinion of Wightman, J., in *Harrington* v. *Binns* (3), that in such a case, where there is no damage, there is no cause of action. But supposing the plaintiff to have suffered some damage, the verdict is clearly excessive, for there is no reason to suppose that the whole amount could have been recovered.

KELLY, C.B. There can be no doubt that in effecting this compromise the defendant acted optimâ fide. Whether or not he was right in his estimate of the degree of Ruffe's solvency and responsibility was a question for the jury, but he believed that he was doing the best in his power for his client. It is contended that no action is maintainable, but on what grounds I am at a loss to understand. Whatever may have been the legal extent of the defendant's authority, he was undoubtedly acting as the plaintiff's attorney; and it does not lie in his mouth to say that the relation of attorney and client did not subsist between them. If it did, and if in the course of it he did any act affecting that client's interests, and directly contrary to her instructions, it is impossible to say that he is not liable. The action then is clearly maintainable.

The question of damages next arises. The defendant contends

(1) 15 M. & W. 88. (2) 15 M. & W. at p. 96. (3) 3 F. & F. 942.

that they ought to be merely nominal, or, at least, smaller than those given, on the ground that the compromise was made without authority, and had no effect on the plaintiff's rights, and that she can therefore still pursue her remedy against Ruffe. But I think this is not so. Several decisions and dicta were cited in support of this contention, some of considerable antiquity, but still authorities which we respect, and by which, so far as they are decisions, we are bound. Modern authority was also cited, establishing the general proposition that the force of an attorney's retainer is at an end, and his power to bind his client by a compromise ceases, when judgment is recovered. We fully admit the general proposition, and it will operate wherever there are no circumstances impairing its effect. We are bound by authority to admit it as a technical rule, but we are equally bound not to extend that rule one hair's breadth, since its effect on transactions in the relation of attorney and client is directly opposed to the common action and understanding of mankind in such matters. To whom does it ever occur, except to a technical lawyer, that unless something further is done to re-establish the attorney's authority, it ceases at judgment, and that without new instructions the steps necessary to obtain the fruits of the litigation cannot be taken? It would be very mischievous to hold, in any case where evidence existed of the relation of attorney and client having been continued or re-created, that the attorney had not authority to act according to the exigency of the case. Assuming that, on the authority of the decisions cited, the retainer here was at an end on the 27th of July, when judgment was signed, was anything done to re-establish the relation? First, communications went on between the defendant and various members of the plaintiff's family as before, without any suggestion on either side that the relation had ceased. As against the plaintiff, however, this might not be sufficient, for we cannot perhaps say that the facts shew her to have given a general authority to those relations to manage the affairs of the suit. But we find the plaintiff herself, almost immediately after the verdict, communicating with the defendant as her attorney, and giving him express instructions as to the payment of the sum awarded by the verdict. The implied authority to recover the amount of the verdict, the payment of which might have to be enforced by execution, shews

1867

BUTLER v. KNIGHT.

that the plaintiff contemplated that the defendant would hold communications with Ruffe, and, if necessary, take proceedings against him. Even the prohibition to compromise, though intended to limit and direct his action, shews that she supposed the defendant would continue to act as her attorney until the whole proceedings were brought to an end, as if no such technical rule had existed. On the other hand, nothing seems to have passed pointing to a cesser of the relation, and we must therefore take it that that relation was continued with its usual authority, limited only by private instructions, of which no notice was given to the other side. If, therefore, the plaintiff now attempted to enforce her judgment against Ruffe, or brought an action on that judgment, Ruffe might safely plead the compromise with her through the medium of her attorney, or apply to the Court on this ground to stay proceedings.

[His Lordship then examined the evidence as to damages, and said that it was not a case in which the Court could say that substantial damages ought not to be given, but that 300*l.* was too large a sum; and that the rule ought to be discharged on the plaintiff's consenting to reduce the verdict to 150*l.*, otherwise, the rule to be made absolute.]

~~CHANNELL, B., concurred.~~

PIGOTT, B. I quite concur with my Lord. No doubt the technical rule is as has been stated by the defendant, but it is subject to this qualification, that the authority may be renewed by any acts shewing the client's intention that his attorney shall still continue to act in that relation. The question, therefore, is, whether there is such evidence here. I think there is. The plaintiff becomes aware after the trial that the defendant is still acting as her attorney in endeavouring to obtain satisfaction, and she does no act to indicate dissent, but only prohibits him from taking less than the whole amount of the verdict. By this she recognises him as her attorney, and therefore as her agent with all those powers which an attorney commonly possesses, including the power to compromise. He binds her by the exercise of this power, but violates his duty in so doing, and cannot therefore

escape liability in this action. With respect to the damages also, I agree with the Chief Baron.

1867

BUTLER v. KNIGHT.

Rule discharged on plaintiff's consenting to reduce the damages to 150*l.*, *otherwise to be made absolute.* (1)

Attorney for plaintiff: *H. C. Barker.*
Attorneys for defendant: *Smith & Shepherd.*

LATHAM *v.* LAFONE.

Jan. 30.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 198—*Protection—Letter of Licence —Unreasonable Deed—Construction.*

A letter of licence is not a deed within the Bankruptcy Act, 1861.

A deed, executed by the defendant as debtor, was assented to by the statutory number of creditors, and registered with the formalities necessary for the registration of a deed under s. 192 of the Bankruptcy Act, 1861. After a recital that the debtor was indebted to his creditors "in several sums of money," the creditors granted him a letter of licence for twelve months, and covenanted not to sue him during that time, and that to any action or proceeding on their debts during that time the deed might be pleaded as a release and discharge. The deed contained no schedule of creditors or of debts, it provided no composition, nor contained any covenant for payment of debts, nor conveyed any property, nor made any provisions with respect to the carrying on of the debtor's affairs. The defendant having been arrested at the suit of a non-assenting creditor:—

Held, that the certificate of registration was no protection under s. 198, on the ground (per Kelly, C.B., and Martin, B.) that, as a deed to bind non-assenting creditors, the deed was unreasonable; and (per Martin, Channell, and Pigott, BB.) that it was not a deed of such a kind as was described by either s. 192 or s. 194 of the Bankruptcy Act, 1861.

THE plaintiff in this action signed judgment on the 20th of December, and on or about the same day the defendant executed the following deed:—

This indenture, made the 20th day of December, 1866, between the several persons, companies, and co-partnership firms, whose names and seals are hereunto subscribed and affixed, or who have in writing assented to these presents by themselves, or their respective partners, agents, or attorneys, being respectively creditors of H. Lafone, of Liverpool, merchant, and hereinafter called the said

(1) Leave to appeal was asked for, but refused.

1867

LATHAM v. LAFONE.

creditors, of the one part, and the said H. Lafone of the other part. Whereas the said H. Lafone is indebted to the said creditors in several sums of money, which he is not at present able to pay, by reason of his principal assets being abroad. Now this indenture witnesseth, that in consideration of the premises, they, the said creditors do, and each of them doth hereby grant unto the said H. Lafone, licence to come, go, pass, and repass from place to place, when and as his business and occasions shall require, for the time of twelve months from the date hereof, without being sued, arrested, or molested in his person or otherwise, for or on account of any debt, sums of money, or other thing, whereby or whereof he is or may be in any wise charged, or chargeable, or indebted to the said creditors, or any of them, or their or any of their respective partners. And each of them, the said creditors, so far as relates to the acts and deeds of himself and his partners, and his and their heirs, executors, and administrators, doth hereby for himself, his heirs, executors, and administrators, covenant with the said H. Lafone, his executors and administrators, that they the said covenanting parties, or their respective executors, or administrators, partners or partner, or any other person, by, with, or through their, or any of their, order, privity, or procurement, will not at any time hereafter during the said term of twelve months, sue, arrest, attach, extend, impede, or molest the said H. Lafone, his heirs, executors, or administrators, or his or their bodies, goods, or estates, for or on account of any debts or sums of money which he now owes, either solely by himself, or jointly with or for any other person or persons, or for or on account of any other thing, wherewith he or they now is, or shall, or may be charged or chargeable. And that these presents may be pleaded in any court of law or equity as a bar, and in discharge of all and every action, suit, and other proceeding, judgment, and execution, which shall or may be brought, commenced, sued, prosecuted, or taken against him, the said H. Lafone, by his said creditors, or any other person or persons, by, with, or through their or any of their acts, privity, order, or procurement. In witness, &c.

This deed was registered on the 3rd of January, under the Bankruptcy Act, 1861, with the formalities necessary for the registration of a deed under s. 192. It was not executed by any of the

creditors, but the statutory number had assented to it. There was no schedule of creditors, but the affidavit of debts required by the order of 22nd of May, 1862, was filed. Although the deed conveyed no property, it was stamped with the maximum ad valorem duty of 200*l.*, imposed by s. 195.

On the 7th of January, the defendant was arrested on a ca. sa. at the suit of the plaintiff, who was a non-assenting creditor; and the officer refusing to release him on the production of the certificate of registration, he on the 9th of January took out a summons before Martin, B., at Chambers, for his discharge from custody. The learned judge made an order for his discharge, on payment into court of the amount of the plaintiff's claim, with liberty to the defendant to apply for the payment for the money out of court, if the Court should think the deed a good deed within the Bankruptcy Act, 1861.

A rule having been obtained accordingly,

Quain, Q.C., and *Crompton*, shewed cause. The deed is unreasonable. No consideration of any kind is given to the creditors for their covenant not to sue. The debtor gives no security for the payment of his debts; he does not even enter into a covenant to pay. The effect of it is to put the whole of the assets in his power, and to prejudice the creditors by the postponement of their claims, without substituting any new remedy. But, secondly, the deed is not within the description of deeds in the act. (1) The object of the 192nd and following sections of the act was, to substitute for the

(1) The introductory words, and the material words of ss. 192, 194 of 24 & 25 Vict. c. 134, are as follows:—

As to trust deeds for benefit of creditors, composition and inspectorship deeds executed by a debtor.

Section 192. "Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding up of his estate, or any of such matters, shall be as valid," &c.

Section 194. "Every deed, instrument, or agreement whatsoever, by which a debtor, not being a bankrupt, conveys, or covenants or agrees to convey, his estate and effects, or the principal part thereof, for the benefit of his creditors, or makes any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management, or winding up of his affairs or estate, or the release or discharge of such debtor from his debts or liabilities, shall" be registered (as therein mentioned).

1867

LATHAM v. LAFONE.

ordinary operation of a bankruptcy, deeds under which the debtor was to obtain a similar discharge, on terms agreed upon by his creditors. But the present deed gives no discharge; it is nothing but a letter of licence, the name and operation of which were perfectly well known before the act, and which would have been distinctly mentioned if it had been intended to include it. The introductory words of s. 192 are an index to the contents, and if a deed is not within any of those terms, it is not within the section. The present deed is not within them, for it is neither a deed of trust for the benefit of the creditors, nor a deed of composition, nor a deed of inspection. Neither is it within the words of the section taken by themselves. It does not relate to the debts or liabilities of the debtor and his release therefrom, for it only professes to give time; neither does it relate to the "distribution, inspection, management, and winding-up of his estate, or any of such matters."

The Court called on

Brett, Q.C., and *Holker*, to support the rule. First, this is a composition deed. The proper description of a composition deed is, that it is a deed by which the creditors, who cannot obtain present payment of their debts in full, agree with one another to limit their rights for their mutual advantage. The consideration which supports such a compact is not one moving from the debtor to the creditors, but one moving from the creditors to one another. Each agrees to be placed on a different footing, in consideration of all the rest agreeing to do the like. But if it is necessary that there should be some benefit moving from the debtor, there is such a benefit here, for the recital amounts to a covenant to pay the debt in full at the end of twelve months, and this has on the principle of *Clapham* v. *Atkinson* (1) been held sufficient to make a deed good under the act. The right which the creditors forego is, the right to be paid at once; the benefits which they receive are, the better chance which they have of being paid in full at the end of twelve months, by their all allowing the debtor time to realize his assets, and the covenant which he enters into to pay at the end of that time. Such a provision for a deferred payment was the substance of the deed which was upheld in *Stone* v. *Jellicoe*. (2) Secondly, a release is not necessary, for the

(1) 4 B. & S. 730; 34 L. J. (Q.B.) 49. (2) 3 H. & C. 263; 34 L.J. (Ex.) 11; 10 Jur. N.S. 976

words of s. 192, "or any of such matters" extend to the words "relating to his debts or liabilities, and his release therefrom," and sever them. But if a release is necessary, that word does not mean necessarily an absolute and unconditional release. The covenant not to sue for twelve months, coupled with the proviso that the deed may be pleaded in bar, satisfies the word: *Corner* v. *Sweet*. (1) Thirdly, the words of the section are not narrowed by the heading; and if the deed is not within the heading, it is at least a deed relating to the management of the debtor's estate; there is an affidavit of property, and the deed is stamped under s. 195. Its effect is to enable the debtor to realize his assets, and it is not to be assumed that he will act malâ fide.

KELLY, C.B. This rule must be discharged. The question is, whether this is a valid deed within s. 192 of the Bankruptcy Act, 1861. First, it is contended that it is not of such a description as to come within that section at all, and the introductory words of the section are relied on to limit its operation. Now certainly this is not a *trust* deed; no trustee is appointed by it, nor is any trust created. Whether it is a composition deed is open to argument; if I were compelled to decide the point, I should say it was not, and that that phrase must be understood in its ordinary acceptation, as meaning a deed by which the creditors agree to receive a smaller sum in place of a greater one. Nor is it an inspectorship deed; for it contains no provisions for the inspection or carrying on of the debtor's trade. And further, the term letter of licence, which properly describes the deed before us, has a distinct and well-understood meaning; and had it been intended to include such deeds in the section, one cannot but think that that phrase would have been used instead of the ambiguous expressions above mentioned. But I should be sorry to decide the case on so narrow a ground, especially as in cases under this act, deeds of this kind have sometimes been treated as composition deeds within the section.

But, although we may refer to the introductory words of the section to put a construction on a doubtful part of the statute, yet if the language of enactment is clear, and includes in express terms such

(1) Law Rep. 1 C. P. 456; 12 Jur. N. S. 413

1867

LATHAM v. LAFONE.

an instrument as this, we should not be justified in limiting that sense by the introductory words. The words then of the section are, "Every deed . . . relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding-up of his estate or any of such matters." The second part of the sentence is in the disjunctive, but the present deed is certainly not within any member of it. The question then arises whether the first part of the sentence is to be read in the conjunctive—that is, whether the deed must relate both to the debts or liabilities of the debtor *and* to his release therefrom, or whether it is sufficient if it relates to the debts and liabilities alone; for certainly there is in this deed no release in the common sense, but only a provision for suspending the rights of creditors executing or bound. I should be disposed to construe the words as meaning any deed relating to the debtor's debts or liabilities, which may or may not provide also for his release therefrom; and I should not therefore have felt on this ground any insuperable difficulty in admitting the deed, had I been compelled to decide the matter upon the construction of these expressions.

But, on the broad ground of the unreasonableness of the provisions of the deed, I decide that it is not within the operation of the act. Looking to the general scope of the enactment, I am of opinion that the intention of the legislature was, to leave to the majority of the creditors the decision of all questions of expediency as to the affairs of the insolvent debtor, but to reserve to the courts of law the determination of the reasonableness of their arrangements. The act has for the first time conferred on a specified majority of creditors the power to bind the rest by their informally given vote; but the protection of the interests of the remainder is committed to the law, and before we can hold the deed binding upon non-assenting creditors, we must see that it is not unreasonable in the mode in which it affects them. Now this deed conveys nothing; it makes no provision for the inspection of the debtor's estate, so as to secure a fund for the payment of debts, and not the slightest benefit in the way of composition is derived under it by the creditors. If there were any such benefit, however small and however distant, it might perhaps not be unreasonable that the

non-assenting creditors should be bound. But the deed is, simply and unconditionally, an agreement to give the debtor twelve months to collect his assets and pay his debts. Now this clearly gives him the power, immediately on the execution of the deed, to make away with his assets, and leave his creditors without the possibility of recovering their debts. But it is contended that there is an implied covenant to pay all the creditors in full at the end of twelve months. If there were indeed an express or an implied covenant to that effect, without pronouncing an opinion as to the validity of the deed in that case, I should hesitate to say that it was unreasonable or void. The deeds in the cases referred to (1) did contain such a covenant, though only for a composition; and small and distant as the advantage is, yet, if the creditors think fit to accept it, it is within the act. But it is not possible in law to put such a construction on this deed. There is no recital, such as has been assumed to exist, by which the debtor admits that he owes certain sums of money to his creditors. There is no schedule of creditors referred to in the deed—the parties to the deed are only creditors actually executing or assenting; and the recital only states that the debtor is indebted to the said creditors "in several sums of money," but admits nothing specific. There is nothing, therefore, by which the debtor can be held, by implication or otherwise, to have covenanted to pay the amount of his debts. See, then, what will be the effect of this deed on a debt, against which the statutory limit of time expires during the twelve months' credit which is given. There is nothing here amounting to a sufficient acknowledgment to take the debt out of the statute; nothing to put the creditor in any different position with respect to it, except that by the lapse of the time during which his right of action is suspended, the debt is barred. If there were no other objection than this, it would be enough to shew the unreasonableness of the deed. On that ground, therefore, my opinion is that this rule must be discharged.

MARTIN, B. I am of the same opinion. I think the proper rule for construing this statute is to adhere to its words strictly; and it is my strong belief that by reasoning on long-drawn infer-

(1) See *Reeves* v. *Watts*, Law Rep. 1 Q. B. 412, and the cases there referred to.

1867

LATHAM v. LAFONE.

ences and remote consequences, the Courts have pronounced many judgments, affecting debts and actions in a manner that the persons who originated and prepared the act never dreamed of. It is better, I think, if we cannot find words which by strict grammatical construction, and according to their ordinary acceptation, refer to the matter before us, to say that the act is defective, and to refuse to decide otherwise than according to the antecedent law. This case, however, seems to me to be pretty clear. In what the Chief Baron has said as to the unreasonableness of the provisions of the deed, I entirely concur, but I will add this further observation. The covenant not to sue Lafone extends to debts in which he is indebted jointly with any other person. The hands, therefore, of the joint creditor are tied up, not only as against Lafone, but as against the joint debtor, who has no other connection with Lafone or his affairs than that he is jointly indebted with him to the same person, and who is freed from liability to suit, for no other reason than that Lafone has become insolvent and executed this deed. It cannot have been intended that all joint creditors should be placed in this position.

But I go further. I think this deed is not within the words of the act, and this is not the first time I have had to consider the question. Various applications were made at Chambers at the end of last year, under the Bills of Exchange Act, 1855, for leave to appear and defend; the ground of defence being the execution of deeds like the present one. I then consulted with Mr. Justice Willes and Mr. Justice Lush, and we all agreed that these deeds were not within the act, and that leave to appear and defend ought not to be given. It is certainly not a trust deed for the benefit of creditors. It is not a composition deed, which I understand in the ordinary sense of the words to mean, a deed by which a man who is unable to pay his debts in full is empowered to pay less in satisfaction of them. Neither is it an inspectorship deed. Then, as to the words of the section itself; it is not a deed relating to the debts and liabilities of the debtor and his release therefrom, but only has for its effect to allow Lafone to go and come at his pleasure for a certain period, with freedom from suit during that time; the other words of the section have no relation to it. A deed to be within this section must, in my opinion, be a

deed by which, if carried out, the creditors will obtain some benefit; and as the words "such deed," in s. 198, mean such deed as is within the previous sections, the debtor who fails to bring his deed within their terms is not entitled to enjoy the effects of a discharge in bankruptcy, or to avail himself of the protection of the certificate.

CHANNELL, B. I also think this rule should be discharged on the ground that this is not such a deed as is referred to by s. 198 of the Bankruptcy Act, 1861. There are two sections for our consideration, the 192nd and the 194th. The latter section has in its purview a different kind of deed from the former, and, in conformity with the opinion to which this Court inclined in the recent case of *Pearson* v. *Pearson* (1), I am disposed to think that a deed, not within s. 192, but registered with the formalities required for deeds under that section, is effectual to afford protection under s. 198, if it is within s. 194. If, therefore, the deed fell under either of these sections, the defendant might be entitled to relief.

With respect to the construction of s. 192, the general heading of the section must, according to the decision of the House of Lords in *Eastern Counties Railway Company* v. *Marriage* (2), be taken as a kind of preamble; if the words of the section clearly go beyond the preamble, they prevail, but if they are doubtful, the preamble may restrain them. Keeping, therefore, the introductory words in mind, we find s. 192 referring to two classes of deeds. The first class relates to "the debts and liabilities of the debtor and his release therefrom;" and, in my opinion, looking for the present at these words without reference to those which follow, the legislature intended that the deed so described should provide for something more than debts and liabilities, and that the words must be read as they are written, conjunctively. But as this deed contains no release, it is not within this part of the section. The second class is introduced by the disjunctive particle; the deeds described in it do not resemble this deed, and my only doubt has been, whether the defendant's argument might not prevail, that the words "or any of such matters" at the end of the second clause refer to the contents of both, so as to dispense with the necessity of

(1) Law Rep. 1 Ex. 308; 12 Jur. N.S. 589. (2) 9 H. L. C. 32; 7 Jur. N.S. 53

1867

LATHAM v. LAFONE.

a release in deeds under the first head. But, taking these words in connection with those immediately preceding them, which are separated from the first clause by the disjunctive particle, and are connected with one another by the conjunctive, and taking them in connection with the introductory words of the section, I cannot put upon them the construction which the defendant's case requires. The 194th section carries the matter no further, for the only additional words in that section are those which relate to the conveyance of the debtor's estate, and there is no such conveyance here; the remainder of the section, introduced by the words "or makes any arrangement or agreement with his creditors," certainly do not differ from those in s. 192 in the defendant's favour. The deed, therefore, is not within the description of the deeds to which the act relates, and I prefer putting my decision on this ground, because, looking at the view which the Courts have lately taken as to the discretionary powers of creditors, I think it better not to rely upon the unreasonableness of the deed.

PIGOTT, B. I am of the same opinion. The main object of these sections was to enable the creditors to manage their own affairs, in conformity with a widely felt and expressed desire to try that system. It was clearly intended to confer large discretionary powers on the creditors, and we ought to give every effect to that intention. I agree that if a deed is unreasonable to the extent of absurdity, we ought not to sanction it; but prudence is so much a relative matter, that it becomes very difficult to say conclusively that a deed is unreasonable on this score when the creditors have said it is reasonable; and, except in the case of inequality, we have no certain test to go by. I therefore agree with my Brother Channell, and prefer putting my judgment on the ground that, for the reasons already stated by him, this deed is neither within the preamble nor the words of the section.

Attorneys for plaintiff: *Wright & Venn.*

Attorneys for defendant: *Chester & Urquhart, for Lace & Co., Liverpool.*

BUCKLE *v.* KNOOP AND ANOTHER.

1867
Jan. 17.

Ship and Shipping—Charterparty—Freight, Mode of calculating—Measurement at Port of shipment or discharge—Increase of Bulk—Custom—Evidence of Custom—Notice of Custom.

By a charterparty made between the plaintiff, a shipowner, and the defendants, merchants at Manchester, it was agreed that the plaintiff's ship should sail to Bombay, and there load a cargo of cotton, and proceed with it to Liverpool, and "deliver the same" on being paid freight at the rate of "75*s.* per ton of 50 cubic feet delivered; the freight to be paid on right delivery of the cargo." The ship accordingly sailed to Bombay, and received a cargo of cotton which, previously to being loaded, had been subjected, in accordance with the usual practice, to a high hydraulic pressure, so as to reduce its solid contents to a minimum. On being removed from the hold at Liverpool the cotton naturally expanded very considerably, and the plaintiff claimed in this action freight on its measurement when delivered, and not when shipped. At the trial it was proved to be the custom of the Bombay trade to pay freight for cotton goods under a charterparty worded as above, on the measurement of the goods at the port of shipment. No evidence was given to shew that the plaintiff had actual notice of the custom:—

Held, first, that, apart from the custom proved, the freight was payable, on a true construction of the charterparty itself, on the measurement of the goods when shipped, and not when delivered; and secondly, that the evidence of the custom was properly admitted as not being contradictory of the terms of the charterparty.

Per Kelly, C.B., and Pigott, B., that the circumstances of the case were such as to raise a presumption that the plaintiff was aware of the custom.

Per Channell, B., that the fact of the plaintiff not having been proved to have had notice of the custom was an objection rather to the weight than to the admissibility of the evidence.

ACTION for balance of freight due from the defendants to the plaintiff under a charterparty, the terms of which, so far as they are material, were as follows: "London, 18th January, 1864. It is this day mutually agreed between T. C. Buckle [the plaintiff], owner of the ship *Gloucestershire*, and Messrs. De Jersey & Co., of Manchester, merchants [the trading name of the defendants], that the said ship shall sail to Bombay and there load from factors of the said affreighters a full cargo of cotton $\frac{\text{and}}{\text{or}}$ wool, and being so loaded shall therewith proceed to London or Liverpool as ordered, on signing bills of lading, and deliver the same in any dock freighters may appoint, on being paid freight as follows, viz. 75*s.* per ton of 50 cubic feet *delivered* for cotton $\frac{\text{and}}{\text{or}}$ wool. The freight to be paid [in a specified manner] on unloading and right delivery of

1867

BUCKLE v. KNOOP.

the cargo. . . . The captain to sign bills of lading, if required, at any rate of freight, but at not less than the chartered freight, without prejudice to this charter."

The ship sailed to Bombay, and was there loaded with a cargo of cotton by the defendants' factors. It is the custom of the Bombay trade, in the case of charters worded like the above, as well as in other cases, before loading cotton, to measure it—for the purpose of ascertaining the space it will occupy in the hold of the ship, and the freight payable for it—in the following manner. The cotton is submitted, at as short a period before shipment as is conveniently possible, to very high hydraulic pressure, so as to reduce the space it would occupy to a minimum, and freight is payable upon the measurement thus arrived at. In this instance the cotton, after being thus compressed, occupied about six tons of 50 cubic feet each, less than the whole content of the ship. The captain was required to sign bills of lading for the cargo, in which the freight was expressed to be payable "as per margin." In the margin was the measurement of the cotton made in the manner above described. The captain at first objected to this mode of measurement, on the ground that his employer would expect to be paid under the charterparty on the measurement of the cargo as delivered and ascertained at Liverpool. Eventually he signed the bills without prejudice. When unloaded at Liverpool, the cargo, being released from the confined space of the hold, expanded very considerably—to an extent, indeed, far beyond what the ship could have contained. The shipowner was therefore entitled, if the measurement was, upon a true construction of the charterparty, to be made at Liverpool, to a large sum for freight beyond that due to him on the Bombay measurement, and which he had received. This action was brought for the difference.

The cause was tried before Lush, J., at the Liverpool summer assizes, 1866, when the above facts were proved. It was not affirmatively shewn that the plaintiff was aware of the custom in the Bombay trade to pay on the measurement at Bombay, but the charterparty was effected on his behalf by a London broker conversant with that trade. A verdict was entered for the defendants, with leave to move to enter it for the plaintiff for 140*l.* 7*s.*, on the ground that the freight was to be calculated on the measurement

of the cargo *delivered* at the port of discharge. A rule was afterwards obtained accordingly, and also for a new trial, on the ground that the evidence of usage had been improperly admitted,—first, because it contradicted the terms of the charterparty; and secondly, because it was not proved affirmatively that the plaintiff was aware of the alleged usage.

Mellish, Q.C., and *Potter*, shewed cause. First, the word "delivered" in the charterparty has nothing to do with the time or place of measurement. It is only inserted to shew that any goods not delivered are not to be paid for. Setting aside the evidence of usage, the charterparty, when fairly construed, indicates that freight is to be paid on the cubic feet occupied by the cargo during the voyage. A shipowner is to be remunerated for the *space* occupied by the cargo. Secondly, the evidence of usage was admissible, and supports the construction which the charterparty, taken alone, would naturally bear. Thirdly, it was not necessary to prove that the plaintiff had *actual notice* of the usage. He was a shipowner, and the contract was made on his behalf by an agent conversant with the Bombay trade. The presumption therefore is, that he was aware of the usage.

James, Q.C., and *J. A. Russell*, in support of the rule. First, the construction placed on the charterparty by the defendants renders the word "delivered" superfluous and without meaning. The same word occurs twice elsewhere in the charterparty, in both cases with an unquestionable reference to the port of discharge. Why, therefore, affix a different meaning or no meaning to it in the clause specifying the mode of paying freight? In *Gibson* v. *Sturge* (1) the bulk of the cargo had increased during the voyage, and it was held (Martin, B., dissenting) that the measurement at the port of shipment was nevertheless to decide the freight payable. But there the charterparty did not contain the word "delivered." In *Coulthurst* v. *Sweet* (2) the freight was payable "*according to nett weight delivered*," words which were assumed by the Court to mean "at the port of discharge." Willes, J., in his judgment, remarks (pp. 653-4) that these words were introduced to exclude the difficulty arising from the decision in

(1) 10 Ex. 622, 1 Jur. N.S. 860 (2) Law Rep. 1 C. P. 649.

1867

BUCKLE v. KNOOP.

Gibson v. *Sturge*. (1) Secondly, if the construction contended for is correct, the evidence of custom given was not admissible because it contradicted the words of the contract; and thirdly, even if the evidence was admissible, as not being actually contradictory, the custom cannot affect the plaintiff, because he was not proved to have been cognizant of it: *Kirchner* v. *Venus*. (2)

KELLY, C.B. I am of opinion that the defendants are entitled to our judgment. The first question turns upon the meaning of a clause in a charterparty entered into between the plaintiff and the defendants, for the conveyance of a cargo of cotton from Bombay to London or Liverpool, at the charterers' option, at a freight described thus: "75*s*. per ton of 50 cubic feet, delivered." On a true construction of this clause, and assuming that there is nothing to qualify the expression used, I think the amount of freight is to be determined by the quantity of goods as shipped at the port of loading, and not by the quantity after delivery at the port of discharge. It is contended on the other hand, and especially having regard to the recent case of *Coulthurst* v. *Sweet* (3), that the words used must mean that the cotton is to be measured at the time and place of delivery. But the word "delivered" appears to me to be used merely with reference to the actual quantity delivered at the port of discharge, and it may be regarded as a completion of the sentence which commences with the words "and deliver the same."

Now, as to the authorities which have been cited, the first, namely, *Gibson* v. *Sturge* (1), is stronger in one respect than the present case. For there the freight was held to be payable on the quantity of corn shipped, although it had increased in bulk during the voyage, and therefore the shipowner might fairly say, "I have conveyed more goods than were shipped. They have occupied a greater space, and accordingly I am entitled to a higher freight." But in this case the increase did not take place, or was not proved to have taken place, during the voyage; indeed it seems to be agreed, that the quantity when shipped was within six or seven tons of the whole content of the ship. *Gibson* v. *Sturge* (1), then, I consider as more than an authority in the defendant's ~~plaintiff's~~ favour, and we must take that case as we find it, and

(1) 10 Ex. 622. (2) 12 Moo. P. C. 361. (3) Law Rep. 1 C. P. 649.

adopt the judgment of the majority of the Court, although one learned judge dissented from it. In *Coulthurst* v. *Sweet* (1), the freight, in order to avoid the difficulty which arose in *Gibson* v. *Sturge* (2), was expressed in the bills of lading to be payable at a certain rate per ton "nett weight delivered," words which lead necessarily to the conclusion that freight would be payable on the "nett weight" at the time and place of delivery. The decision proceeded upon that construction of the words used, but is not an authority for a similar construction of the words used here. And certainly, in the absence of express authority, I think it would be inequitable to ask for freight upon a greater bulk than was shipped. Upon the authority of *Gibson* v. *Sturge* (2), therefore, and upon principle, I am of opinion that the true construction of this clause in the charterparty is, that the quantity on which freight was payable was to be ascertained by measurement at Bombay.

Secondly, as to the evidence of custom given, I think that it was properly admitted. Where in a mercantile contract words are used capable of more than one interpretation, they must be interpreted according to the meaning which mercantile men of knowledge and experience would fix upon them. This rule sometimes has been held to prevail to an extent at first sight almost amounting to a contradiction of the expressions explained. But here the evidence of usage does no more than give effect to what I think is at any rate the natural construction of the contract. With regard to the case of *Kirchner* v. *Venus* (3), it only proves that people in Liverpool may well be supposed to be ignorant of rules in existence on the other side of the world, at Sydney. They are not in such a case required to know them. But here the contract is entered into between merchants of London and Liverpool, cognizant of the Bombay trade, and it relates to a subject-matter connected with London, Liverpool, and Bombay. Under these circumstances, a customary interpretation of the contract may be proved, although no proof be given affirmatively that one of the parties had heard or knew of the custom. The jury were justified, indeed bound, to presume that all the parties to the contract were cognizant of the usage which would govern it. Upon all grounds,

(1) Law Rep. 1 C. P. 649. (2) 10 Ex. 622. (3) 12 Moo. P. C. 361.

1867

BUCKLE v. KNOOP.

therefore, whether with reference to the terms of the charterparty looked at alone, or to those terms as explained by evidence of usage, this rule must be discharged.

CHANNELL, B. I am of the same opinion, and have but little to add to the observations of the Lord Chief Baron. On each of the three questions submitted to us, I think the ~~plaintiff is~~ entitled to our judgment. Apart from usage, Mr. Mellish's construction of the charterparty seems to me to be the true one. With regard to the cases cited, I do not feel at all pressed with the decision in *Coulthurst* v. *Sweet* (1), because it by no means proves *Gibson* v. *Sturge* (2), which is an authority in the ~~plaintiff's~~ favour, to be wrong. Then as to the evidence of usage, I am of opinion that it was properly admitted. It was not offered to contradict, but to explain. I may add that the case of *Bottomley* v. *Forbes* (3) is an authority to shew that it was admissible. Then it is contended that the evidence was improperly admitted, because it was not shewn affirmatively that both parties to the contract were aware of the usage, and in support of that contention the case in the Privy Council, *Kirchner* v. *Venus* (4), was cited. But the objection merely amounts to this, that the evidence was inadmissible because it was incomplete for want of other evidence, shewing that the usage was known to both parties. That is an objection rather to the weight of the evidence than to its admissibility. This rule, however, was obtained only on the ground of improper reception of evidence and not either of misdirection or that the verdict was against the weight of evidence. The three points made thus reduce themselves to two. First, what is the construction to be placed on the contract itself? and secondly, was the evidence of usage inadmissible, in which case the verdict would have to be set aside and a new trial given? As to the first question, I entirely agree with the Lord Chief Baron. As to the second, I do not think that upon this rule the verdict is impeachable because some evidence was rightly admitted, which possibly may have been imperfect or incomplete. And inasmuch as I think that, upon the true construction of the contract, the evidence of usage, though admissible, was not

(1) Law Rep. 1 C. P. 649.
(2) 10 Ex. 622.
(3) 5 Bing. N. C. 121.
(4) 12 Moo. P. C. 361.

1867

BUCKLE v. KNOOP.

required, the imperfection or incompleteness of the evidence given could not have been a valid ground for granting a new trial, even if the rule had been obtained in another form.

PIGOTT, B. I am of the same opinion. But I base my judgment rather upon the second ground than upon the construction of the contract apart from evidence of usage. I think that the evidence given of that usage was admissible. The case of *Bottomley* v. *Forbes* (1) was very similar to this, and decides the question; indeed, there is in principle no difference between them. The parol evidence in both was offered to explain, and not to contradict, the terms of the written contract.

Rule discharged.

Attorneys for plaintiff: *Clarke, Woodcock, & Ryland, for Taddy, Bristol.*

Attorneys for defendant: *Uptons, Johnson, & Upton, for Lowndes & Co., Liverpool.*

CRAGG *v.* TAYLOR. (2)

Jan. 26.

Debtor and Creditor—Charging Order—Charge on contingent Equitable Interest —1 & 2 Vict. c. 110, *s.* 14—3 *&* 4 *Vict. c.* 82, *s.* 1.

The defendant, being possessed of shares in a public company, transferred them to B. as a security for a debt. Subsequently he assigned them (subject to B.'s debt) to trustees upon trust to repay a loan which had been made to him, by his brother, and to apply the surplus for the benefit, at the trustees' discretion, of his wife, his children, or himself. There were other trusts for the benefit of his wife and children, and an ultimate trust, on his wife's decease, and in case no child attained the age of twenty-one, or being a daughter married before that age, to the defendant and his assigns.

Held, that he had an "interest" in the shares capable of being charged under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1.

AN ORDER, made by Byles, J., charging 150 shares in the Glynrhonwy Slate Company, with payment of the amount of the judgment recovered by the plaintiff in this action, was afterwards discharged by an order of Bramwell, B., on the ground that the defendant had, under the circumstances detailed below, no "inte-

(1) 5 Bing. N. C. 121. (2) See also Law Rep. 1 Ex. 148.

1867

CRAGG v. TAYLOR.

rest" in the shares, capable of being charged under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1.

The shares were registered in the name of one Bennett, to whom the defendant had transferred them on the 24th of November, 1864, as a security for advances made by him from time to time to the defendant. On the 25th of November the defendant, in consideration of a loan of 500*l.* made to him by his brother, by deed conveyed the shares, subject to the debts secured on them, and also other property, to trustees upon trust to sell and hold the produce of the sale upon the trusts following: first, to repay the loan; secondly, to apply such part of the trust moneys, as the trustees in their absolute and uncontrolled discretion should think proper, to the maintenance, support, advancement, or otherwise for the benefit of the defendant and Sarah Mary Taylor, his wife, and of their children, or of any one or more exclusively of the aforesaid objects of this present trust, in such sums and at such times and under such restrictions and upon such conditions and generally in such manner in all respects, whether by absolute payment or by way of loan, with or without security, or otherwise howsoever, as the trustees should think fit; thirdly, without prejudice to the trusts aforesaid, and not so as in any wise to control the trustees' discretion, to pay the income arising from the trust funds to Sarah Mary Taylor for life; fourthly, after her decease to pay the fund, both capital and income, to such of the children as the parents jointly by deed or the survivor of them should by deed or will appoint, and in default of appointment to the children equally on attaining the age of twenty-one, or (if a daughter) on marriage; and, fifthly, if no child should attain the age of twenty-one or marry, to hold the fund in trust for the defendant, his executors, administrators, and assigns.

1 & 2 Vict. c. 110, s. 14, enacts that stock or shares in any public company, standing in the name of any person against whom judgment shall have been entered up in any of the superior courts "in his own right or in the name of any person in trust for him," may be charged by a judge's order with the payment of the amount of the judgment.

3 & 4 Vict. c. 82, s. 1, enacts that the provisions of the previous act shall be deemed to extend to the interest of any judg-

ment debtor, "whether in possession, remainder or reversion, and whether vested or contingent," as well in any such stocks or shares as aforesaid as also in the dividends, interest, or annual produce of such stocks, &c.

A rule having been obtained to set aside the order of Bramwell, B., on the ground that the defendant had an interest in the shares capable of being charged,

Jan 12. *H. T. Cole, Q.C.*, shewed cause. These shares stand in the name of Bennett, not in trust for Taylor, but (as to the balance, if any, beyond the debt due to him) in trust for the trustees of Taylor. Taylor has no interest in the shares, except what may arise in the event of his surviving his wife and of none of his children attaining the age of twenty-one or marrying. That is too remote an interest to be chargeable.

McIntyre, in support of the rule. Taylor has, unquestionably, some interest under the deed. There is not only the ultimate limitation in his favour, but also the possibility of the trustees exercising their discretion at once for his sole benefit. Then Bennett is a trustee for him to the extent of his interest, whatever that may be. He would have, no doubt, in the first instance to pay the trustees under the deed, but they would be mere conduit pipes, to pass on whatever they received to their cestui que trust. In *Baker* v. *Tynte* (1), it was held that a contingent life interest in stock, which had been assigned by the debtor on certain trusts with an ultimate trust in his own favour, was chargeable. The policy of the acts is to enable a creditor to charge any interest, however small.

Cur. adv. vult.

Jan. 26. The judgment of the Court (Kelly, C.B., Martin, Channell, and Pigott, BB.) was delivered by

KELLY, C.B. This is a rule to set aside an order of Bramwell, B., discharging an order of Byles, J., charging certain shares in a company with a debt due by the defendant Taylor, on the ground that the shares, which are in the name of one Bennett, are held by him in trust for Taylor; and the question

(1) 2 E. & E. 897; 29 L. J. (Q.B.) 233.

1867

CRAGG v. TAYLOR.

is, whether Taylor possesses an interest in these shares which can be attached or charged under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1.

The interest in question arises under a deed which, subject to a claim of one Bennett, in respect of several sums of money advanced by him to Taylor, conveys these shares, with other property, to certain trustees in trust: First, to pay a debt due by Taylor. Secondly, to apply the trust fund to the maintenance of Taylor, his wife and children, at the discretion of the trustees. Thirdly, to pay the dividends for life to Sarah, the wife of Taylor. Fourthly, to pay over the fund, at the death of the wife, to such of the children as the husband and wife shall appoint; and in default of appointment, the fund to be equally divided among such of the children as shall attain the age of twenty-one. Fifthly, if no child shall attain the age of twenty-one, then to Taylor and his assigns.

This is a contingent interest only; and it may be doubted whether, under 1 & 2 Vict. c. 110, s. 14, such an interest could be attached. But by 3 & 4 Vict. c. 82, s. 1, any interest of a judgment debtor, whether vested or contingent, may be charged. It is unnecessary, therefore, to rely upon the judgment of the Court of Queen's Bench in the case of *Baker* v. *Tynte* (1), where the general effect of both acts of parliament seems to have been fully considered; for under the express terms of the later act—3 & 4 Vict. c. 82—a contingent interest of this nature is made chargeable. The mortgagee of the shares and the trustees under the deed may no doubt be delayed in their remedy for their own claims by the sale or other disposition of the shares, until they can obtain the authority of a court of equity. But this is an inconvenience, in many cases inevitable, in giving effect to these acts, which are imperative in their terms, and compel a court of law to order that the property shall be charged. This rule, and the original order of Byles, J., must therefore be made absolute.

Rule absolute.

Attorney for plaintiff: *George Smith.*

Attorneys for defendant: *Phelps & Bennett.*

(1) 2 E. & E. 897; 29 L. J. (Q.B.) 233.

[IN THE EXCHEQUER CHAMBER.]

1867
Feb. 8.

NOBLE *v.* WARD AND OTHERS.

Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 17—*Variation of Contract—Implied Rescission—Invalid Substituted Contract.*

A contract in writing was made for the sale of goods above 10*l.* in value, to be delivered at a future time. Before the time for delivery arrived the parties made a parol agreement extending the time:—

Held, that the parol agreement, being invalid under the Statute of Frauds (29 Car. 2, c. 3), s. 17, did not effect an implied rescission of the former contract.

Moore v. *Campbell* (10 Ex. 323) followed.

APPEAL from the judgment of the Court of Exchequer making absolute a rule to set aside a nonsuit, and for a new trial. (1)

Holker (*Baylis* with him), for the appealing defendants. The defendants' contention is, that the contract of the 27th of September although not enforceable at law, by reason of s. 17 of the Statute of Frauds, is good to rescind the previous contract of the 18th of August. It is stated in Com. Dig. Action on the Case. Assumpsit (G), that a written contract may be discharged by parol, or impliedly by a subsequent inconsistent promise; and this rule was followed recently in *Hobson* v. *Cowley* (2) and *Lavery* v. *Turley*. (3) It is not therefore conclusive against the rescission of the contract of the 18th of August by that of the 27th of September that the latter was not in writing. In the second place, it is established by *Stead* v. *Dawber* (4), agreeing with *Goss* v. *Lord Nugent* (5), that where, by a new contract, the terms of a previous contract are varied, the old contract is rescinded, and a new contract embodying the alterations, and the unaltered part of the old one, is substituted for it; and *Marshall* v. *Lynn* (6), following that case, lays down that it is unnecessary to inquire whether the alteration is an essential part of the agreement. Therefore the contract of the 27th of

(1) Reported Law Rep. 1 Ex. 117, where the facts and pleadings are stated.

(2) 27 L. J. (Ex.) 205.

(3) 30 L. J. (Ex.) 49.

(4) 10 Ad. & E. 57.

(5) 5 B. & Ad. 58.

(6) 6 M. & W. 109, at p. 117.

1867

NOBLE v. WARD.

September, extending the time for the performance of that of the 18th of August, rescinded the former contract, and made a new contract incorporating so much of the old one as remained unaltered. If, then, it had been in writing, it is clear that the substituted contract, and that alone, would have been enforceable. But although for want of the formality required by the statute, the contract of the 27th of September could not have been enforced, yet the provision that it shall not be "allowed to be good" does not make it void altogether, and it still has the effect of rescinding the former contract.

[BLACKBURN, J. That argument amounts to this, that it is good for the purpose of rescission, though not good for any other purpose whatever.

WILLES, J., referred to *Doe* d. *Berkeley* v. *Archbishop of York* (1) and *Doe* d. *Biddulph* v. *Poole*. (2)]

This contention is supported by *French* v. *Patton* (3), where a contract having been altered in such a manner that it could not be sued on in its altered form (see *Hill* v. *Patton* (4)), it was held that the plaintiff could not sue upon it in its original form.

[BLACKBURN, J. There the original contract, which was in writing, had itself been altered on the face of it, and the case was decided on the principle of *Master* v. *Miller*. (5)]

The dictum in *Moore* v. *Campbell* (6), which is relied on by the plaintiff, was not necessary to the decision of the case, for there a new trial was necessary to ascertain whether any contract had been made by the defendant.

He also referred to *Taylor* v. *Hilary*. (7)

Mellish, *Q.C.* (*Jones*, *Q.C.*, with him), for the plaintiff, was not called upon.

WILLES, J. This is an appeal from the judgment of the Court of Exchequer making absolute a rule to set aside a nonsuit, and for a new trial. The action was brought for non-acceptance of goods

(1) 6 East, 86.
(2) 11 Q. B. 713.
(3) 9 East, 351.
(4) 8 East, 373.
(5) 4 T. R. 320.
(6) 10 Ex. 323; 23 L. J. (Ex.) 310.
(7) 1 C. M. & R. 741.

pursuant to a contract dated the 18th of August, by which the goods were to be delivered in a certain time. The defendants pleaded that the contract was rescinded by mutual consent. At the trial, they established that, on the 27th of September, before any breach of that contract, it was agreed between the plaintiff and the defendants that a previous contract of the 12th of August should be rescinded (as to which no question is made), that the time for delivering under the contract of the 18th should be extended for a fortnight; and other provisions were made as to taking back certain goods, which we need not further notice. The contract of the 27th of September, however, was invalid, for want of compliance with the formalities required by s. 17 of the Statute of Frauds. The defendants contended that the effect of the contract to extend the time for delivery was to rescind the contract of the 18th of August; and if the former contract had been in a legal form, so as to be binding on the parties, that contention might have been successful, so far as a change in the mode of carrying out a contract can be said to be a rescission of it; but the defendants maintained that the effect was the same, although the contract was invalid. In setting aside the nonsuit directed by the learned judge who tried the cause, the Court of Exchequer dissented from that view, and held that what took place on the 27th must be taken as an entirety, that the agreement then made could not be looked on as valid, and that no rescission could be effected by an invalid contract. And we are of opinion that the Court of Exchequer was right. Mr. Holker has contended, that though the contract of the 27th of September cannot be looked on as a valid contract in the way intended by the parties, yet since, if valid, it would have had the effect of rescinding the contract of the 18th, and since the parties might have entered into a mere verbal contract to rescind simpliciter, we are to say that what would have resulted if the contract had been valid, will take place though the contract is void; or, in other words, that the transaction will have the effect which, had it been valid, the parties would have intended, though without expressing it, although it cannot operate as they intended and expressed. But it would be at least a question for the jury, whether the parties did intend to rescind—whether the transaction was one which could not otherwise

1867

NOBLE v. WARD.

operate according to their intention; and a material fact on that point is, that, while they expressly rescinded the contract of the 12th of August, they simply made a contract as to the carrying into effect that of the 18th, though in a mode different from what was at first contemplated. It is quite in accordance with the cases of *Doe* d. *Egremont* v. *Courtenay* (1) and *Doe* d. *Biddulph* v. *Poole* (2), overruling the previous decision of *Doe* d. *Egremont* v. *Forwood* (3), to hold that, where parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights. This is good sense and sound reasoning, on which a jury might at least hold that there was no such intention. And if direct authority were wanted to sustain this conclusion, it is supplied by *Moore* v. *Campbell* (4) where, upon a plea of rescission, the very point was taken by Sir Hugh Hill, who would no doubt have made it good had it been capable of being established. With reference to his argument that the contract was rescinded, Parke, B., said (5): "We do not think that this plea was proved by the evidence. The parties never meant to rescind the old agreement absolutely, which the plea, we think, imports. If a new *valid* agreement substituted for the old one before breach would have supported the plea, we need not inquire, for the agreement was void, there being neither note in writing, nor part payment, nor delivery, nor acceptance, of part or all;" and he adds: "this was decided by the cases of *Stead* v. *Dawber* (6) and *Marshall* v. *Lynn*. (7)" As to the cases cited from East, too much importance has been attached to them. The first case (8) amounts to no more than this, that the Court was bound to construe the contract before it without regard to the stamp, and having done so, then to see how the Stamp Acts operated upon it. In the second case (9) it was held that, although the Stamp Acts operated to prevent the plaintiff from recovering upon the policy as altered, that circumstance could not enable him to recover upon

(1) 11 Q. B. 702.
(2) 11 Q. B. 713.
(3) 3 Q. B. 627; see 11 Q. B. 723.
(4) 10 Ex. 323; 23 L. J. (Ex.) 310.
(5) 10 Ex. at p. 332.
(6) 10 Ad. & E. 57.
(7) 6 M. & W. 109.
(8) *Hill* v. *Patton*, 8 East, 373.
(9) *French* v. *Patton*, 9 East, 351.

it in its original form, when he had himself consented to the alteration of the written words. 1867

NOBLE v. WARD.

BLACKBURN, MELLOR, MONTAGUE SMITH, and LUSH, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *N., C., & C. Milne, for Slater & Heelis, Manchester.*

Attorneys for defendants: *Reed & Phelps, for Sale & Co., Manchester.*

[IN THE EXCHEQUER CHAMBER.] *Feb. 8.*

WILSON *v.* JONES.

Policy of Insurance—Policy on Adventure—Atlantic Cable—Insurable Interest—Wages.

3C P 633.
7 QB 81,

The plaintiff, being a shareholder in the Atlantic Telegraph Company, caused himself to be insured with the defendant in a policy, which was a common printed form of a marine policy, filled up with interlineations and marginal additions, and which contained the following words: "At and from Ireland to Newfoundland, the risk to commence at the lading of the cable on board the *Great Eastern*, and to continue until it be laid in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted each way . . . . the ship, &c., goods, &c., are and shall be valued at 200*l.* on the Atlantic cable, value, say on 20 shares, at 10*l.* per share:" and also, written opposite to the clause, "touching the adventures, &c.," the words, "it is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable, from and including its loading on board the *Great Eastern*, until one hundred words be transmitted from Ireland to Newfoundland, and vice versâ, and it is distinctly declared and agreed that the transmission of the said one hundred words from Ireland to Newfoundland, and vice versâ, shall be an essential condition of the policy." The attempt to lay the cable failed, through the cable breaking whilst it was being hauled in to remedy a defect in the insulation; but one half of the cable was saved:—

Held, first, that the policy was not on the cable, but on the plaintiff's interest in "the adventure," that is, on the profits to be derived by him from the success of the adventure; and *semble*, that the adventure was the attempt to lay the cable on that voyage.

Secondly, that such an interest was an insurable interest.

Thirdly, that the loss was a loss by the perils insured against.

1867

WILSON v. JONES.

Fourthly, that, whether the adventure insured was the adventure of laying the cable on that voyage, or of laying it generally, the loss was total, inasmuch as by the breaking of the cable the probability of laying it was reduced to a mere chance, and the case was therefore within the rule making the loss of a ship total at the time of capture, although there may exist a spes recuperandi.

APPEAL from the decision of the Court of Exchequer (1), discharging a rule to set aside the verdict for the plaintiff, and to enter a verdict for the defendant.

The plaintiff, being a shareholder in the Atlantic Telegraph Company, caused himself to be insured with the defendant, in the policy now sued upon, which was the ordinary printed form of a marine policy, with interlineations and marginal additions. The material words of the policy were as follows: "Lost or not lost, at and from Ireland to Newfoundland, the risk to commence at the lading of the cable on board the *Great Eastern*, and to continue until the cable be laid down in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted from Ireland to Newfoundland, and vice versâ, the risk on the policy then to cease and determine, upon any kinds of goods and merchandizes, &c." (in the ordinary words of a marine policy, the *Great Eastern* being the ship named); "the said ship, &c., goods and merchandizes, &c., for so much as concerns the assured, by agreement between the assured and assurers, in the policy are and shall be valued at 200*l.* on the Atlantic cable, value, say on twenty shares, valued at 10*l.* per share."

In the margin, opposite the usual clause, "touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us in the voyage, they are of the seas, &c., and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, &c., or to any part thereof," were written the words, "it is hereby understood and agreed that the policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable, from and including its loading on board the *Great Eastern*, until 100 words be transmitted from Ireland to Newfoundland, and vice versâ; and it is distinctly declared and agreed that the trans-

(1) Law Rep. 1 Ex. 193.

mission of the said 100 words from Ireland to Newfoundland, and vice versâ, shall be an essential condition of the policy." There was the usual warranty against average under 3*l.*, unless general.

The adventure having failed by the breaking of the cable whilst it was being hauled in to remedy a defect in the insulation (1), one half of the cable being saved, the plaintiff brought the present action, and obtained a verdict, subject to leave reserved to the defendant to enter a verdict for him, on the ground that the loss was not a loss by the perils insured against, or, if any, only an average loss, and that there was no evidence that it was higher than 3*l.* per cent., or to reduce the damages, on the ground that, if any loss, it was an average loss. (2)

The rule having been granted, and afterwards discharged by the Court below, the defendant appealed.

Brett, Q.C. (*Cohen* with him), for the appellant, the defendant. The first inquiry is, what is the subject matter of the policy? It is laid down in the judgment of the Court below that this is an insurance on the adventure; but to insure the success of a maritime adventure is a wager, and to make the policy good some other construction must be given to it.

[WILLES, J. The distinction between a wagering contract and one which is not wagering, depends upon whether the person making it has or has not an interest in the subject matter of the contract.

BLACKBURN, J. Does not this resemble an insurance on profits? Is it not an insurance of the profits to arise from the success of the adventure?]

In Arnould Ins. vol. i. p. 288 (2nd ed.) it is said of freight, that in order to make it an insurable interest, the assured "must be so situated with respect to it, as that he would certainly have earned freight but for the intervention of the loss;" and the same is laid down with respect to insurance on profits (p. 290). Now, there is no such certainty here. But further, in an ordinary insurance on

(1) See the judgment of Willes, J., post, p. 144.

(2) After the commencement of the action, another and successful attempt was made to lay a telegraphic wire on the same route, and the old broken line was also picked up, repaired, and laid down safely.

1867

WILSON v. JONES.

profits the goods from which the profits are to arise are on board, and are subject to the risks insured against; but the profits here must arise from the shares, which were never on board or at risk, and which, according to the decision in *Paterson* v. *Harris* (1), could not be insured. If then the shares could not be insured, how can the profits, which are an excrescence of them, be the subject of insurance?

[WILLES, J., referred to *McSwiney* v. *Royal Exchange Assurance Company*. (2)]

The construction of the policy itself, which must be construed as a marine policy, shews that not the adventure but the cable was the subject matter of insurance. The words are, "on the Atlantic cable;" these words standing alone would plainly make the cable the subject matter, and their effect is not altered by those which follow, "value, say on twenty shares, at 10*l.* per share," for these words only indicate the mode in which the plaintiff's interest in the cable is arrived at. Again, in the words inserted in the margin the cable is still the subject referred to; the perils are perils "attending the conveyance and successful laying of the cable." The rest of these special words relate only to the duration of the risk, which might as well, had it been possible to calculate it, have been expressed as a specified time. Wherever, therefore, in the policy the subject matter of insurance is referred to, it is described as the cable, and the policy appears intended to secure its safety during the whole period of its manipulation in the operation of laying it down; that period being further extended till the transmission of 100 words.

[BLACKBURN, J. On that construction, if the cable were not injured, but an accident happened to the *Great Eastern*, by which the adventure were rendered impossible, the loss so caused would not be within the policy. But was it not intended to cover any such risk and danger?]

Secondly, the loss which is to be made good must be a loss caused by the perils insured against; the next question will therefore be, what were the perils included in the policy, and was this loss proved to have been caused by them? The general words

(1) 1 B. & S. 336; 30 L. J. (Q.B.) 354.

(2) 14 Q. B. 634, 646; 18 L. J. (Q.B.) 193; 19 L. J. (Q.B.) 222.

inserted in the margin must be read in after the words of particular description, and be limited by the context. In the absence of these words, a peril causing the loss must have been shewn, being an ordinary peril of the sea; these words extend the policy to extraordinary perils of the same kind, that is, to such a peril as may happen in the most successful voyage, but to nothing farther. But in this case the weather was calm, and nothing was being done but what the parties contemplated as to be done on the most successful voyage. The cause of the loss may have been an inherent defect in the cable; but at least no proximate cause of the loss is proved, coming within the description of the perils insured against, and the case is like that of a ship going down in a perfectly calm sea.

[BLACKBURN, J. Is there any case or authority shewing that it is necessary for the insured to prove a storm, or any other definite cause of the loss? It is certainly not the usage to put him upon shewing affirmatively, that the cause of loss was an ordinary sea peril.

LUSH, J. It is for the defendant to prove the contrary affirmatively, as upon a plea of unseaworthiness.

WILLES, J. A case was tried before me on the Northern Circuit on a policy of insurance, in which it appeared that the ship left port loaded with a cargo of timber, and on the following night sank. There was no storm, nor was any cause of the loss proved. I told the jury that this was evidence on which they might well find unseaworthiness, but they found the contrary. I should have preferred a verdict for the defendant; but no suggestion was made that the loss was not a loss by perils of the sea.]

Thirdly, this is, at least, not a total loss. If the insurance is on the cable, it cannot be suggested that the loss is total. If, on the other hand, it is on the adventure, it must be admitted, and it is an argument against that construction, that the matter is so vague and indefinite as to be difficult to deal with. But, even in this case, the adventure is to be realized by means of the cable; the possession, therefore, of the cable goes far to realize the adventure, and unless the cable is totally gone, there cannot be said to be a loss of the whole adventure.

[LUSH, J. The adventure insured was the adventure of laying the cable on that occasion.

1867

WILSON v. JONES.

WILLES, J. The risk is specifically limited to the loading of the cable on board the *Great Eastern*, which seems to refer to that occasion only.

BLACKBURN, J. Even assuming the insurance to be on the adventure of laying the cable generally, and not limited to that particular occasion, is not the case analogous to the case of the capture of a ship with a spes recuperandi? In such a case the loss is considered as total at the time of capture, and unless the recapture is made before action brought, or, by the American law differing in that respect from ours, even though the recapture is made before action brought, the assured is entitled to recover as for a total loss. Now here the chance of recovering from this accident had not been realized before action brought.]

Temple, Q.C. (*Leofric Temple* with him), for the plaintiff, was not called upon.

WILLES, J. This is an appeal from the decision of the Court of Exchequer discharging a rule to enter a verdict for the defendant in an action on a policy of insurance, upon the ground that the loss was not a loss by the perils insured against, and that, if it was so, it was not total, and that there was no proof of an average loss over 3*l.* per cent. Everything depends on the construction of the policy, taken in connection with the circumstances referred to in it, and especially on the construction of the written words superadded to the ordinary form. These words contain an unusual description, and also unusual provisions relating to a novel and speculative enterprise, by which a joint-stock company sought to establish for profit a telegraph across the Atlantic, and for that purpose to lay down a line of cable for 2000 miles over the bottom of the sea. It was an enterprise involving great risk and uncertainty, and the value of the shares in the company depended upon its success, and were affected by the same risk. The plaintiff had shares in the company; and it is material to observe the character of his interest depending upon his ownership of these shares. Without referring further to authority or reasoning over again what has been decided by the highest authority, it may be stated (as it has been asserted in argument), that the plaintiff had, in respect of his shares, no direct interest in the cable. As a shareholder, he had an interest in the

profits to be made by the concern, but he had none in the property of the concern itself. This was the ground on which it was decided that such an interest was not within the Statutes of Mortmain. (1) It is with reference to that state of facts, familiar to every man of business, that we must read the policy to see what has been insured, and whether it was not the interest the plaintiff had in the enterprise, that is, the advantage to arise to him from the contingency of the cable being laid down and becoming an effectual cable, which, it was assumed, it probably would be, if 100 words were transmitted each way. A further question has arisen, whether the policy referred to this particular occasion, or to any attempt to lay the cable, and though it is not necessary to decide this point, it will be proper to consider it.

The first question therefore is, what was the subject matter insured? Is this, as has been contended, an insurance on the cable, or is it an insurance of the plaintiff's interest in a share of the profits to be derived from the cable which was to be laid down? In one sense, indeed, it is an insurance on the cable; that is, it affects the cable, as an insurance on freight affects the ship. The state of the ship and freight are so connected that it is impossible that they should be dissevered, except in cases where the loss of freight is effected by the loss of the goods only, in which case it might equally be said that the insurance on freight is an insurance on the goods. But except in that sense, it will appear, when the language of the policy is examined, that the insurance is an insurance, not on the cable, but on the interest which the plaintiff had in the success of the adventure. The words in which the object insured is described are as follows: "The said ship, &c., goods and merchandize, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy are and shall be valued at 200*l.* on the Atlantic cable." If these words stood alone, they would be obviously an insufficient description of the interest which the plaintiff possessed. But they are followed by the words "value, say on twenty shares, valued at 10*l.* per share," which qualify the previous words, and are themselves followed by a context, plainly shewing that the thing

(1) See *Myers* v. *Perigal*, 11 C. B. 90; 21 L. J. (C.P.) 217; 2 De G. M. & G. 599; 22 L. J. (Ch.) 431. 17 Jur 145.

1867

WILSON v. JONES.

insured was the value of the plaintiff's shares, or rather his interest in the profits to be derived from his shares when the cable should be laid, either on that occasion, or at some future time. In the margin the following words are written: "It is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable." Looking at the subject matter and at these words, and excluding any argument as to the meaning put by judicial construction on the more general words printed at the end of the policy, "touching the adventure and perils, &c., they are of the seas, &c., and all other perils, losses, and misfortunes, &c.," it is impossible to avoid arriving at the conclusion stated by Martin, B., as the opinion of the Court below, that this was an insurance on the plaintiff's interest in the adventure.

The argument addressed to us in opposition to this view at one time almost took the form of saying that such a contract would be a wager. If it is meant that it would be within the 8 & 9 Vict. c. 109, we must reject the argument, for that statute has no application to a contract upon a matter in which the parties have an interest. It relates to betting upon a mere future event, not to contracts of indemnity; which, though they may be properly classed with wagers in the scientific distribution of law, are differently dealt with in its practical administration. But it is said that the transaction is unusual, improbable, and out of the ordinary course, and that the Court ought not to support an insurance of so speculative an interest. If, however, we start with the consideration that this policy is an insurance on profits, though we admit the danger, the only conclusion will be that we ought to make ourselves quite sure that the language used has the meaning attributed to it; but we are not to be deterred from giving it effect by reason of the alleged danger. It would, indeed, be extremely dangerous to do so, when we consider that the same argument might have been urged in *McSwiney* v. *Royal Exchange Assurance* (1), as to the insurance of profits on goods. The plaintiff there had bought 6000 bags of rice, then lying in an Indian port, which he had sold to a merchant in London at a considerable

(1) 14 Q. B. 634, 646; 18 L. J. (Q.B.) 193; 19 L. J. (Q.B.) 222.

profit; and he insured on the profits. After part of the rice had been put on board, the vessel on which it was being loaded was driven to sea, the rice that had been shipped was spoilt, and by reason of the delay in the voyage, the residue could not be forwarded in time. It therefore became impossible to fulfil the contract, and the expected profits were lost. The defendants offered to pay the ordinary profits on the rice shipped, but resisted the claim for profits on that which was not on board. The argument was principally that those profits were not sufficiently described; and it was a subsidiary argument that the goods not loaded were never in peril within the meaning of the policy. In the Court of Queen's Bench judgment was given for the plaintiff, no one supposing that by reason of the resemblance of the contract to a wager it could not be enforced. In the Exchequer Chamber that judgment was reversed, on the ground that the words were not sufficient to describe these speculative profits, and that the loss of the rice not shipped was not a loss within the perils of the sea insured against. In delivering the judgment of the Court, Parke, B., said: "We have no doubt that the plaintiff might have recovered, in the events which have happened, for a total loss, if he had been insured by a policy properly adapted to the case, and so drawn as to cover the special interest from the time the rice was appropriated by the vendors and ready to be shipped at Madras, and also to assure him against losses of the expected profit, not merely by the loss of all the rice by the perils of the sea, but by the loss of any part of it, or the loss of the ship, or delay of the voyage beyond the month of May; in any of which contingencies the special interest in profit would have been entirely defeated." And again, at the close of the judgment, he says: "According to the true construction of the policy, it attached to the profit on no goods, nor has there been a loss of profit on any goods by perils insured against, except on the 1200 bags, which has been paid for by the money paid into court. If, indeed, it attached to profit on those on shore, there has been no loss of that profit by the perils of the sea, but only a retardation of the voyage, for which the defendants are not responsible, unless the policy especially provided for such an event." The present policy is evidently framed with skill and under good advice, and was, doubtless, drawn with a reference to

1867

WILSON v. JONES.

the case I have just referred to. I am the more fortified in this conclusion as to what is the subject matter insured, from the difficulty of suggesting any other construction of the policy, except that it is an insurance on the cable, which, for the reasons before mentioned, is not a rational construction.

The insurance, then, was on the adventure, but what was the extent and duration of that adventure? I will here refer to the language describing the duration of the risk. The policy is to cover every risk attending the laying of the cable, "from and including its loading on board the *Great Eastern*, until 100 words be transmitted from Ireland to Newfoundland, and vice versâ; and it is distinctly declared and agreed that the transmission of the said 100 words from Ireland to Newfoundland, and vice versâ, shall be an essential condition of the policy." The true conclusion to be drawn from these words, and especially from the concluding ones, is either that the insurance was on the adventure limited to the endeavour to lay the cable on that occasion; or, if not, it must at least be imputed to the parties that they supposed, unless the result were then arrived at, that there would be an end of the matter.

The second question is, whether this is a loss by the perils insured against. If the insurance were limited to the printed language in an ordinary policy, it would be necessary to do that in which we should have little authority to guide us, namely, to put a construction on the words ordinarily occurring at the end of the clause enumerating the risks insured against: "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods, and merchandizes, and ship, &c., or any part thereof." But this is unnecessary; for, on reading the marginal words, which provide that the policy "shall cover every risk and contingency attending the conveyance and successful laying of the cable," those words being introduced by the words "in addition to the ordinary perils," it appears that the parties have decided this question for themselves; and that this being a risk and contingency attending the successful laying of the cable, it is within the policy, unless the facts shew that the loss was caused by a peril only to be attributed to an inherent vice of the cable itself, or to some other implied exception

1867

WILSON v. JONES.

to the perils included in the policy. This brings me to the statement of what actually happened, which is as follows:—After stating that the ship started with the cable on board, the case goes on to say: "On the morning of the 2nd of August, when from 1100 to 1200 miles of the cable had been laid down, it was discovered that the electric current did not pass. A portion of the cable was then hauled back into the ship; while this was being done, the cable parted on board ship inside the bows, and the broken end fell into the sea. The weather which prevailed at and about the time of the parting of the cable was described in the ship's logs and proved in evidence, to have been as follows:—'Light westerly airs, and fine clear weather.'" Then follows a statement of the attempts that were made to recover the cable. No averment of mala fides is made, or probably could be; nor is it stated that the accident was due to any inherent vice of the cable; therefore we have it that in the course of laying down the cable it became necessary to haul it in, that in hauling it in a portion broke, that those in charge of the business were or may have been under a necessity of hauling it in, and that this breaking of a portion caused the failure of the whole adventure, if considered as the adventure of laying the cable on that voyage. We are not called on to pronounce any judgment upon the facts. The only question made at the trial was, whether there was any evidence to go to the jury of a loss by the perils insured against. Having read the language of the policy, I will only say, that on these facts it is impossible to come to the conclusion that there was no evidence on which the jury might find that the loss was a loss by perils insured against.

Thirdly, assuming that there was a loss of the subject matter of the insurance by the perils insured against, was there a total loss? It was probably rightly agreed, that if the insurance was on the cable, there was no total loss; but it is not necessary to examine this, because our construction of the policy is, that it was not the cable, but the plaintiff's interest in the adventure which was the subject of insurance. If, then, we consider the adventure as limited to that one attempt, or if what was insured was the profit to be made by successfully laying down the cable on that occasion, there is clearly a total loss; if, on the other hand, what was

1867

WILSON v. JONES.

insured was the whole adventure in which the plaintiff was interested, and which was intended to be realized in that attempt, then by the defeat of that attempt there was a total loss, on the same principle on which a vessel is totally lost to the insured by capture by the enemy, although the presence of ships of war of its own nation makes it more probable that it will be recaptured, than that it will be taken into a hostile port. It is a total loss at the time. However subsequent events might affect the result, the loss was presumably and conventionally total at the period when it occurred. I will therefore conclude by saying, that this was an insurance on the plaintiff's interest to the extent of 200*l.*, in an adventure which consisted in laying down the Electric Telegraph Cable in such a condition as to transmit a message, either on that particular trial by the *Great Eastern*, or if not on that particular trial, then in the adventure generally. The former opinion is, I think, right; but, taking into consideration the nature of the subject matter, it was in any case totally lost by the loss of all chance of laying the cable on that voyage. The judgment must therefore be affirmed.

BLACKBURN, J. I am of the same opinion. I agree in all that my Brother Willes has said, and will only add a few words. As to the argument, that this policy would on the plaintiff's construction be a wager, I apprehend that the distinction between a policy and a wager is this: a policy is, properly speaking, a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to; and I know no better definition of an interest in an event than that indicated by Lawrence, J., in *Barclay* v. *Cousins* (1), and more fully stated by him in *Lucena* v. *Craufurd* (2), that if the

(1) 2 East, 544.

(2) 2 B. & P. N. R. at p. 301: "Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them. If this be the general nature of the contract of insurance, it follows that it is applicable to protect men against uncertain events, which may in anywise be of disadvantage to them; not only those persons to whom positive loss may arise by such events, occasioning the deprivation of that which they may possess, but those also, who, in consequence of such events, may have intercepted from them the advantage or

event happens the party will gain an advantage, if it is frustrated he will suffer a loss. Now we must see whether the plaintiff was in this position. He was interested in a company which was about to lay down a cable across the Atlantic. If that event happened, there can be no doubt the owner of shares in the company would be better off; if it did not happen, there can be no doubt his position would be worse. It follows, then, equally without doubt, that if by proper words the parties have entered into a contract of insurance for that interest, the policy is good. Now, if they had stopped at the word cable, the plaintiff's interest would not have been correctly or sufficiently described, according to the principle of the case of *McSwiney* v. *Royal Exchange Assurance Company*. (1) Neither if they had said that it was the cable as shipped on board the *Great Eastern*, would it have been a sufficient description. But here they have used words as to which I will only say, that no one who looks at them fairly, and reads them in connection with the circumstances, can fail to see that the intention of the parties would be frustrated by such a construction as is contended for by the defendant. Then, as to the question whether the loss is within the perils insured against, were those perils only the ordinary perils? or was it intended by the words "in addition to the ordinary perils, &c.," to include all dangers occurring in the course

---

profit, which, but for such events, they would acquire, according to the ordinary and probable course of things;" at p. 302: "Where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it, as to have benefit from its existence, prejudice from its destruction."

At p. 301, after saying, that "where, from the variety of probable contingencies (which, independent of the specified risks, may prevent the assured from deriving any benefit from the subject matter insured) it is impossible to weigh the probability of its being intercepted by such risks, an interest so uncertain may not be the subject of surance;" the learned judge adds, "And so Lord C.J. Willes, in *Fitzgerald* v. *Pole* (Willes, 648), considered it; where, to shew that in that case the insurance must be on the ship, and not on the voyage, he relied on the impossibility of such contingency as the loss of the voyage being valued; so that, according to him, the impossibility of valuing, and not the want of property, was the reason why that voyage could not be the subject matter of this contract."

(1) 14 Q. B. 634, 646; 18 L. J. (Q.B.) 193; 19 L. J. (Q.B.) 222.

1867

WILSON v. JONES.

of laying the cable which might interrupt the enterprise, and so frustrate the profits which the plaintiff hoped to derive from its success? It cannot be doubted that the plaintiff meant to stipulate for an indemnity against any injury to his interest by dangers so occurring; the cable was, in fact, broken in an attempt to haul it in in the course of laying it; it is therefore impossible, if any sense is to be given to words used, not to say that what has happened was within the risk and contingency insured against. Lastly, I am clearly of opinion that the interest insured was the plaintiff's interest in the laying of the cable on that particular voyage. But if it be otherwise, and the interest was an interest in the cable being laid at any time, there was still a total loss; for although there was some chance of the cable being recovered, it was a mere chance; and the same difficulty would have to be encountered on any future attempt to recover it, that had baffled the efforts of those engaged on the present occasion. The loss then was total; and if there was anything to abandon, the underwriters were entitled to the benefit of it. But though it was not necessary to decide the point, the insurance was in my opinion for that voyage, and there was therefore nothing to abandon. The judgment of the Court below must be affirmed.

MELLOR, J., concurred.

MONTAGUE SMITH, J. I concur; and I only wish to add that I think the insurance was on this particular voyage.

LUSH, J., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Norris & Allen, for Simpson & North, Liverpool.*

Attorneys for defendant: *Marshall, Westall, & Roberts, for Lace & Co., Liverpool.*

MABER *v.* MABER, EXECUTRIX.

1867
Feb. 9.

Statute of Limitations (21 *Jac.* 1, *c.* 16), *s.* 3—*Acknowledgment—Payment—Transaction where no Money actually passes.*

To constitute a payment of interest sufficient to take a debt out of the operation of the Statute of Limitations, it is not essential that money should actually pass between the debtor and creditor.

After a debt due to the plaintiff from his son had been barred by the statute, the plaintiff, his son, and his son's wife, had an interview at which the interest due was calculated. The plaintiff's son then put his hand into his pocket, as if to get out the money to pay it. The plaintiff stopped him, and writing a receipt for the interest, gave it to his son's wife, saying that he would make her a present of the money. No money actually passed between the parties:—

Held (by Martin, Channell, and Pigott, BB.; Bramwell, B., dissenting), that this transaction was a sufficient payment to take the debt out of the Statute of Limitations.

DECLARATION against the defendant, as executrix of George Maber the younger, for money lent, and on accounts stated.

Third plea, that the cause of action did not accrue within six years before this suit. Issue thereon.

At the trial before Bramwell, B., at the sittings in Middlesex, in Hilary Term last, it appeared that the plaintiff had, on the 9th of June, 1857, lent George Maber, jun., his son (the defendant's testator), 80*l.*, for which his son then gave a promissory note, payable on demand. The son soon after went to Australia, and no payment on account of either principal or interest was made during six years, but in August, 1864, the son having returned to England, a transaction took place at the plaintiff's house, which was relied on by him as sufficient to take the case out of the Statute of Limitations. (1) On that occasion the plaintiff, his son, and his son's wife (the defendant) met, and an interview took place, of which the defendant and plaintiff gave a different account. The judge left it to the jury to say which of the two they believed, and they found that the plaintiff's version was the true one. According to his evidence, an account of the interest due was made out, and the son put his hand into his pocket, as if to pay the money. The plaintiff then said, "Stop a bit;" and before any money was

(1) 21 Jac. 1, c. 16, s. 3.

1867

MABER v. MABER.

actually produced, wrote out a receipt in the following form:— "1864, Aug. 26. Received of Mr. G. Maber, jun., 28*l.*, being seven years' interest due on 80*l.*, due June 28, 1864. (Signed) G. Maber." He then remarked that he had been told that he had never before made his son's wife a present, and turning to her, added, "I shall make you a present of this money. See you take care of the receipt; it may be useful to you with my executors." An indorsement was made on the promissory note that the interest was paid. No money, however, actually passed between the parties, either at that or any subsequent time.

A verdict was entered for the plaintiff, with leave to move to enter it for the defendant, on the ground that no payment of interest or principal had been made so as to take the case out of the Statute of Limitations.

A rule nisi having been obtained accordingly,

Feb. 8. *McIntyre* shewed cause, and contended that there had been a payment. It was not necessary that money should actually pass. Here it would have been given to the plaintiff, but for his own interposition. If he had received it, he would have immediately handed it to his son's wife. To have given the money therefore, would have been an unnecessary ceremony. In law, however, it must be treated as having been given and returned: *Ashby* v. *James* (1); *Amos* v. *Smith.* (2)

Henry James, in support of the rule, contended that to treat the transaction as a payment would be to render the statute nugatory. Payment must mean actual payment. Where a man waived his right to be paid, he could not afterwards insist that he had been paid.

Cur. adv. vult.

Feb. 9. The Court differing in opinion, the following judgments were delivered:

MARTIN, B. This was a rule obtained to enter a nonsuit in a case tried before my Brother Bramwell, and the question arises upon it whether or not a certain transaction then proved takes a debt out of the operation of the Statute of Limitations. The

(1) 11 M. & W. 542. (2) 1 H. & C. 238; 31 L. J. (Ex.) 423.

action was brought against the executrix of the plaintiff's son for some money which the plaintiff had lent to his son, who had afterwards gone to Australia. Upon his return from Australia the parties met, and the son stated he was prepared to pay the interest upon the loan. He intimated that he had the money, and the jury have found that he was then and there ready to pay it. Upon this the plaintiff observed to his son's wife, who was present, that she had said he had never made her a present, and that he would make her a present with this interest. A receipt was thereupon given for the interest, and an indorsement made upon the promissory note which had been given for the loan, that the interest was paid. The question is, whether this transaction takes the case out of the Statute of Limitations. I am of opinion that it does. By Lord Tenterden's Act (1) it is provided that, in actions of debt, grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed to be sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the Statute of Limitations (2), unless such acknowledgment or promise shall be made in writing, signed by the party chargeable thereby; and there is a proviso that nothing therein contained shall alter or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever. This question of payment of principal and interest, therefore, is left to what may be said to be the common law, and any transaction which would have amounted to a payment of principal or interest in the interval between the original Statute of Limitations and the passing of Lord Tenterden's Act continues to have the same effect. I have had occasion twice to give a judgment upon this matter; first, in the case of *Bodger* v. *Arch* (3), and secondly, in the case of *Amos* v. *Smith* (4); and in both cases I stated that, in my judgment, any facts which would prove a plea of payment of interest in an action brought to recover it, would be a payment sufficient to bar the statute. The case of *Amos* v. *Smith* (4) was stronger than this, because there was there no intention of actually paying the interest, but the jury have here found that the debtor was ready and willing to pay it; and in

(1) 9 Geo. 4, c. 14, s. 1.
(2) 21 Jac. 1, c. 16, s. 3.
(3) 10 Ex. 333.
(4) 1 H. & C. 238; 31 L. J. (Ex.) 423.

1867

MABER v. MABER.

my judgment, when a man comes prepared to pay a debt, and has the money, in point of fact, in his hand to pay, but the creditor thinks fit to say, "Do not pay me, I give you that money, and I consider it as having been paid," at the same time handing the debtor a receipt for the money, and making an indorsement of payment upon the security—that is a payment. There is no necessity for the debtor to go through the form of taking the money out of his pocket and giving it to the creditor, and the creditor returning it to him. If the jury have found the real transaction to be as I have stated it, all that prevented actual payment being, that it was thought unnecessary to go through the idle ceremony of one party taking the money out, and the other handing it back again, that was equivalent to payment.

I may add that this decision steers clear of the cases about an agreement or promise to pay; for I do not rely on any other matter but the state of facts found by the jury, which would have supported a plea of payment if an action had been brought for the interest, and which, therefore, in my judgment, constitutes a payment to take the case out of the Statute of Limitations. The rule must accordingly be discharged. I am authorized to state that my Brother Pigott concurs in the view I have expressed.

BRAMWELL, B. I think this rule ought to be made absolute, This case is as it would have been if Lord Tenterden's Act (1) had never passed: and I quite agree that if the evidence given would have supported the plea of payment, then there is a sufficient payment of the interest to take the case out of the Statute of Limitations. My Brother Martin has correctly stated the facts, except that the jury did not find positively that the deceased had the money in his pocket, but only that he put his hand towards his pocket, and said he was ready to pay. From that finding, however, we may well infer that he had the money there. But to my mind this evidence would not support the plea of payment. If there had been any alteration in the legal rights of the parties, it might have done so, for I do not say it is absolutely necessary that the money should actually pass. If the plaintiff had said, for example, to the deceased man, "Do not pay me, but pay your

(1) 9 Geo. 4, c. 14.

wife," and the deceased man had paid his own wife, and given her the money, or if the plaintiff had said, "Do not pay me but undertake to pay somebody else to whom I owe the money," then there would have been an alteration in the legal position of the parties. But nothing of the sort was proved here. The case was no better than if the plaintiff had said, "Keep the money yourself." And I say this not merely because the money was directed to be given to the wife of the deceased; for if the direction had been to give it to any third person, that person could never have enforced payment of the money from the deceased, because there would have been no consideration moving from him, and therefore, in truth, it would have been nudum pactum as far as any promise or undertaking on the part of the deceased was concerned. In short, to my mind, the contention on the part of the plaintiff is this: To say to a man, "You need not pay me, but I will consider you have," is equivalent to payment; or—to put it in another form—to say, "I will not call upon you to pay, but I will give you a receipt as though you have paid me," is a payment. I cannot concur in that proposition, and therefore I think the rule ought to be made absolute.

CHANNELL, B. My mind has not been entirely free from doubt during the discussion of this case, but on the whole I agree in the conclusion at which my Brother Martin has arrived, that this rule should be discharged. The question strictly is one of law, and we are all agreed that the answer to an inquiry, whether the facts would have supported a plea of payment, is the test of whether they take the case out of the statute. Now, I think, with regard to the way in which the matter was put by my Brother Bramwell, there may be some doubt whether a mere receipt given for the interest of a debt separated from the principal would be sufficient to prove a plea of payment in an action brought for that interest. But the facts in this case went to the jury, who found the plaintiff's version of them to be true. Therefore, we may consider the case as if it depended upon the plaintiff's evidence only; and then I think we are authorized to infer that the jury have found there was a payment so far as it was for them to find it; that is, they found the facts from which we are to consider whether payment, in

1867

MABER v. MABER.

strictness of law, was made. We may take it that the money was in the pocket of the deceased. He was willing to produce it, and a receipt was given by the plaintiff, in the presence of the wife of the deceased, and an indorsement made upon the note. I think, altogether, that would be enough to justify us in coming to the conclusion upon a plea of payment, that it was proved; and there is therefore sufficient to take the case out of the Statute of Limitations, though no money actually passed.

Rule discharged.

Attorneys for plaintiff: *Dangerfield & Fraser.*
Attorney for defendant: *George A. James.*

June 8.

D'ARCY *v.* THE TAMAR, KIT HILL, AND CALLINGTON RAILWAY COMPANY.

Directors—Company—Bond under Company's Seal—Unauthorized Bond—Construction—Companies Clauses Consolidation Act, 1845 (8 *Vict. c.* 16.)

Directors exercising the powers conferred by the Companies Clauses Consolidation Act, 1845, must act together, and as a board.

The prescribed quorum of directors in the defendants' company being three, the secretary affixed the seal of the company to a bond, after having obtained the written authority of two directors at a private interview, and at another private interview the verbal promise of a third to sign the authority. The company being sued upon this bond:—

Held, that the seal of the company was affixed without lawful authority, and that the company were therefore not liable on the bond.

ACTION on a bond for 2000*l.*, dated the 29th of September, 1864, given under the seal of the defendants to the plaintiff, and conditioned for the payment, with interest, on the 29th of September, 1866, of 1000*l.*, recited to be due to the plaintiff from the defendants for work and labour. (1)

Plea, non est factum. Issue thereon.

The cause was tried before Martin, B., at the sittings after Easter Term, 1866.

It was proved that the seal of the defendants' company was affixed by the secretary (who also countersigned the bond), and it

(1) The plaintiff was the defendants' engineer; he sued in this action on behalf of one Hall, to whom he had assigned the bond.

was admitted that the secretary was the proper person to affix the seal, provided he were duly authorized, but it was contended for the defendants that he was not so authorized.

The secretary gave evidence that he was authorized by three directors to affix the seal, but, on cross-examination, admitted that the assent of two out of the three had been obtained at a private interview at the house of one of them, where the two signed a letter authorizing the issue of the bond, and that, on meeting the third in the street, he had then obtained his assent and his promise to sign the letter. The signature of the third, however, was not obtained until after the issuing of the bond. It further appeared that, when the bond was given, there were more than three directors, and it was not shewn that any committee had been appointed under 8 Vict. c. 16, s. 95.

The Companies Clauses Act, 1845 (8 Vict. c. 16), which is incorporated in the defendants' special act, provides (s. 90), that "the directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, except as to such matters as are directed by this or the special act to be transacted by a general meeting of the company, but all the powers so to be exercised shall be exercised in accordance with, and subject to, the provisions of this and the special act," and subject also to the control of general meetings. It also provides (s. 92) that the directors "shall hold meetings at such times as they shall appoint for that purpose;" that "in order to constitute a meeting there shall be present at least the prescribed quorum;" and "that all questions shall be determined by the majority of votes of the directors present;" ss. 95 and 96 provide for the appointment of committees, with the power of doing any acts which the directors might do.

By s. 97, "the power which may be granted to any such committee to make contracts, as well as the power of the directors to make contracts on behalf of the company, may be lawfully exercised as follows: that is to say, with respect to any contract which, if made between private persons, would be by law required to be in writing and under seal, such committee or the directors may make such contract on behalf of the company in writing and under the common seal of the company."

1867

D'ARCY v. THE TAMAR, KIT HILL, AND CALLINGTON RAILWAY COMPANY.

The defendants' special act (27 & 28 Vict. c. ccxciv.) s. 24, provided that the number of directors should be, until the first general meeting of the company, eleven, and afterwards should not exceed six, nor be less than three; "and the quorum of a meeting of directors shall be three, unless the number of directors is reduced to three, and then, until the number is raised, the quorum shall be two."

A verdict was found for the plaintiff for 1081*l.*, leave being reserved to the defendants to move to enter a verdict for them, or a nonsuit, on the ground that the seal was affixed without lawful authority. A rule having been obtained accordingly,

Patchett and *Thesiger* shewed cause. The bond bearing the company's seal is primâ facie the company's bond, and it lies upon them to disprove it. It is not denied that the seal was affixed by the proper person, and it must therefore be assumed against the company that all the necessary formalities were complied with, and strict proof of the contrary must be given: *Clarke* v. *Imperial Gas Light Company.* (1) But further, the secretary swears that he was authorized by three directors to affix the seal, and it appears that in fact he was so. In answer to this, the defendants contend that the directors had no authority, because they were not acting together. But this is not shewn to be necessary; or, if it were so, yet any state of facts not absolutely excluded by the evidence might be assumed in support of a due exercise of authority. The bond, then, being formally regular, the defendants are bound to shew that its issue was inconsistent with the statutes under which they acted: *Hill* v. *Manchester and Salford Waterworks Company.* (2) But it is not contended that the directors had not power to issue the bond, which was given for the payment of a debt due for work done for the company, and is clearly within their ordinary powers. Were it, however, in respect of the mode of issuing it or otherwise in excess of their authority, yet the company would have no defence against the plaintiff, who was without notice of the irregularity: *Royal British Bank* v. *Turquand* (3); *Agar* v. *Athenæum Life Assurance Society.* (4) Lastly, whatever objection

(1) 4 B. & Ad. 315.
(2) 2 B. & Ad. 544.
(3) 5 E. & B. 248; 6 E. & B. 327; 24 L. J. (Q.B.) 327; 25 L. J. (Q.B.) 317.
(4) 3 C. B. (N.S.) 725; 27 L. J. (C.P.) 95.

of this kind can be taken to the deed, it ought to be specially pleaded, and cannot be proved under non est factum.

[BRAMWELL, B., referred to *Bank of Ireland* v. *Evans' Trustees* (1) and asked whether, if the seal had been affixed by the secretary without any colour of authority, it could be contended that the plaintiff could recover.]

It must be admitted he could not. They also referred to *Laird* v. *Birkenhead Railway Company* (2) and *Lowe* v. *London and North Western Railway.* (3)

Montagu Chambers, Q.C., and *Paterson*, in support of the rule, were stopped.

MARTIN, B. We are all of opinion that the allegation that this is the bond of the company is disproved. The Companies Clauses Consolidation Act, 1845 (which is incorporated with the defendants' special act), enacts (ss. 90, 91), that, with the exception of certain specified matters reserved to the general meetings, the business of the company shall be conducted by the directors; and s. 92 and the following sections point out the mode in which they are to conduct it. They are to hold meetings, at which the prescribed quorum must be present, and questions at such meetings are to be determined by a majority of votes. The quorum prescribed by s. 24 of the special act was here three, for it is in evidence that, when this bond was given, there were more than three directors. No special resolution of the company is shewn authorizing the issue of this bond, and it does not appear that any committee has been appointed under s. 95 of the general act. The bond, therefore, must, by s. 97, have been made by the directors, acting in the manner pointed out by the previous sections. The question then is, whether the company's seal was affixed to the bond by the authority of the directors so acting, for the secretary had no authority to affix it unless he was authorized by them. Now it is not necessary that there should be any fixed place of meeting, but it is quite clear that the directors are to act together, and in a meeting,

(1) 5 H. L. C. 389; 4 Irish Com. Law Rep. 624.

(2) John. 500; 29 L. J. (Ch.) 218.

(3) 18 Q. B. 632; 21 L. J. (Q.B.) 361. An attempt was also made at the trial, and on the argument, to connect the bond sued on with some resolutions passed by a special meeting of the company but was unsuccessful.

1867

D'ARCY v. THE TAMAR, KIT HILL, AND CALLINGTON RAILWAY COMPANY.

whereas the authority on which the secretary acted was given by two only acting together, and by the subsequent assent of a third: The authority, therefore, was not of such a character as enabled the secretary to affix the seal so as to bind the company.

BRAMWELL, B. I am of the same opinion. It is not to be presumed that what has been done is ultrâ vires, and therefore when an instrument is produced under the seal of the company, it is primâ facie to be taken that the seal was properly affixed. But it is here shewn affirmatively that the seal was not properly affixed; for this could not be done, except by the authority of such a number of directors as had power to act for the company, acting jointly and as a board. This is clearly the intention of the act; and it is an obvious consideration that, if it were otherwise, a quorum of directors might meet at one place with power to act for the company, and another quorum might, at the same time, meet at another place, with equal power and come to an opposite determination. But it is manifest that the seal was affixed without the authority of the directors meeting as a board, and the bond is therefore void. If it is not contended that the affixing of the seal by the secretary without any colour of authority would bind the company, then it follows that, although, if you do not examine into the authority, the bond under the company's seal is primâ facie good, yet when the inquiry is made, and the want of authority is disclosed, the company cannot be bound. The plaintiff suffers no injury by this decision, for the debt for which the bond was given remains as good as before.

CHANNELL, B. I also think this rule must be made absolute. On the production of the bond under the corporate seal it is primâ facie to be assumed that it is valid; the defendants must shew that the necessary authority was not given; and I have no doubt that it is open to them to shew this under the plea, non est factum. They have accepted this onus of proof, and I think that they have satisfied it; for it appears that there were more than three directors, and that the authority was never given by a quorum of three. Without saying that the board are bound to meet at any particular place, yet when an authority is given to a less number to bind the whole body, they must meet in some place where all may be pre-

1867

D'ARCY v. THE TAMAR, KIT HILL, AND CALLINGTON RAILWAY COMPANY.

sent, and may have the opportunity of expressing their assent or dissent. There is nothing to warrant us in assuming that the authority was given by these persons as a meeting of directors, and the seal was therefore not affixed by the secretary in such a way as to bind the company.

PIGOTT, B. I am of the same opinion. No doubt this is the deed of the company if it is the deed of the directors properly done; the question is, whether it is so done. The special act (s. 24) makes "the quorum of *a meeting* of directors" three, and the general act speaks also of meetings of directors. Three directors have given their assent to the issuing of this bond, but were they a meeting? Clearly they were not; but, on the contrary, the secretary casually picked up three members of the body of directors, and obtained their assents separately. The seal has been affixed without the authority of a meeting of directors, and the bond is therefore invalid.

Rule absolute.

Attorney for plaintiff: *R. Warren.*
Attorney for defendants: *J. Gurney.*

FORSTER *v.* MACKRETH.

Feb. 12.

Attorney—Partnership—Power to draw Cheques—Post-dated Cheque—Bill of Exchange.

A member of a firm of attorneys has no implied authority to bind his co-partners by a post-dated cheque, drawn in the name of the firm.

Quære, as to the effect of the revenue laws upon post-dated cheques.

2 Ex D. 2
19 C.L.D 4

THE plaintiff sued the defendant, in his first count, as holder of a bill of exchange for 18*l.*, drawn on one J. Dickenson, and indorsed by the defendant to the plaintiff, and dishonoured; in his second count, as bearer of the defendant's cheque for 90*l.*, dated the 20th of July, 1865, drawn by the defendant on the Imperial Bank, Limited, in favour of J. S. or bearer, and delivered to the plaintiff, and dishonoured.

To these counts respectively the defendant pleaded (amongst other pleas) denial of the indorsement, and denial of the making;

1867

FORSTER v. MACKRETH.

and also special pleas, alleging respectively that the defendant did not indorse or make the bill and cheque respectively, except by one W. O. J. Tucker in the name of a firm in which Tucker and the defendant were partners, and by virtue of Tucker's authority as such partner, and that Tucker indorsed and made the bill and cheque fraudulently, and without the consent or authority of the defendant, and not on account of any of the purposes of the partnership, nor in respect of any claim or demand on the partnership, and alleging notice.

On these pleas the plaintiff joined issue.

At the trial before Martin, B., in Michaelmas Term, 1866, the plaintiff's evidence was, that the defendant and Tucker were in partnership as attorneys; that on the 27th of July, 1865, the plaintiff, at Tucker's request, discounted for the firm the bill sued upon; that on the 13th of July Tucker asked the plaintiff to advance him 80*l.* for a client of the firm, and that he accordingly gave him a cheque for that sum (which was afterwards duly paid), and at the same time received in return the cheque of the firm sued upon (90*l.*), drawn by Tucker, and dated the 20th of July. He further stated that such transactions were in the common course of business between himself and the firm; but it did not appear that the defendant had been cognizant of any such transaction, and the defendant denied that he ever gave authority to Tucker to draw or indorse bills in the name of the firm, or that he had any knowledge of the transaction in question. The defendant admitted, however, that each partner was accustomed to draw cheques in the name of the firm in the ordinary way.

The learned baron, on this evidence, ruled, that the defendant was not liable for the bill, but was so for the cheque; but he directed a verdict for the amount of both, giving the defendant leave to move to enter a nonsuit, or a verdict for him. A rule having been obtained accordingly,

Jan. 31. *Gates* shewed cause. Although ordinarily a partner in a firm of attorneys cannot, according to *Hedley* v. *Bainbridge* (1), bind his partner by a promissory note or a bill of exchange, yet such partners have ordinarily power to draw cheques in the name

(1) 3 Q. B. 316.

1867

FORSTER v. MACKRETH.

of the firm, and the holder of such a cheque is not called upon to inquire whether it is or is not post-dated.

[KELLY, C.B. If it is admitted that a partner has power to bind the firm by a post-dated cheque, which has the same effect as a bill of exchange at so many days date, is not it vain to say that he has no authority to bind by a bill of exchange?]

The date of the cheque did not destroy its character as a cheque, and if presented at once, the banker must have paid it. (1)

Hayes, Serjt., and *J. M. Howard*, shewed cause. A bill of exchange and a post-dated cheque are in substance the same. A true cheque being payable on demand implies that there are assets to meet it, and only pledges the credit of the drawer as a secondary consequence; but a post-dated cheque implies the contrary; the banker could not charge his customer with the amount if he paid it before the day, nor is it intended by the parties that it shall be available till the day arrives. It is therefore like a bill of exchange or a promissory note, only an engagement that at the day named there shall be funds to meet it, and it is merely a device for raising money upon the faith of that engagement. The only power of drawing cheques to be implied from a partnership between attorneys, or from the practice proved here, is such as might be expressed in a deed of partnership by saying, that each of the partners shall have power to draw lawful cheques in the name of the firm in the usual and ordinary manner.

[CHANNELL, B. The question may be put thus: An attorney has not ordinarily power to bind his partner by his acceptance, but he may by usage have that power. Where such a power exists, it is assumed to exist for all purposes, and its exercise binds unless it is shewn that the authority was limited, and was known to be so, or the transaction is accompanied by fraud. If, then, the liability on cheques and on bills of exchange is governed on this point by the same rule, wherever the authority to draw cheques exists (as here), any cheque drawn by a partner is primâ facie good.

(1) The question of whether a post-dated cheque was valid was also argued, and 31 Geo. 3, c. 23; 55 Geo. 3, c. 184; and 21 & 22 Vict. c. 20; and the cases of *Austin* v. *Bunyard*, 34 L. J. (Q.B.) 217, and *Allen* v. *Keeves*, 1 East, 435, were referred to; but as the judgment of the Court proceeded entirely on the other point, those arguments are not reported.

11 Jur. N.S. 875.

1867

FORSTER v. MACKRETH.

Then, assuming the drawing of post-dated cheques to be irregular, does the fact of a cheque being post-dated intimate that the partner drawing it is acting in excess or contravention of his authority or contract?]

It does. He cited *Hasleham* v. *Young* (1); and *Yates* v. *Dalton*. (2)

Cur. adv. vult.

Feb. 12. The judgment of the Court (Kelly, C.B., Martin, Channell, and Pigott, BB.) was delivered by

MARTIN, B. In this action the defendant was sued upon a bill and a cheque, the one indorsed, the other drawn, by his partner in the name of the firm. It is clear that no action can be maintained upon the bill, because there is no authority in one member of a firm of attorneys to bind the rest by drawing or indorsing bills in the name of the firm. With respect, however, to the cheque, the case is different. There was abundant evidence that both parties had authority to draw cheques in the name of the firm, as occasion required. But in the present instance the facts were peculiar. The cheque was post-dated, being dated seven days later than the time when it was actually delivered; it was brought to the plaintiff by Tucker, the partner of the defendant, and, being a cheque for 90*l.*, it was exchanged for the plaintiff's cheque for 80*l.* It was stated by the partner who brought it, that he desired to raise money for the purposes of the firm; and, so far as we can see, there is no ground to impute fraud to the plaintiff, who stated that such transactions were common between himself and that partner, purporting to act on behalf of the firm. It was contended by my Brother Hayes at the trial, and upon the argument of this rule, that in point of fact it was the same thing as if Tucker had given a bill for the same amount at seven days' date, the intention of both parties being that the cheque should be held over until the day of the date arrived. We have considered the case a great deal, and much doubt has existed upon the point in my own mind, and in the minds of other members of the Court; but we are all of opinion that we cannot in substance distinguish this cheque from a bill of exchange at seven days' date. This being so,

(1) 5 Q. B. 833. (2) 28 L. J. (Ex.) 69.

1867

FORSTER v. MACKRETH.

without entering into the further question which was argued as to the operation of the revenue laws upon post-dated cheques, we are of opinion that the defendant is not bound by the transaction, and he is therefore entitled to have the rule made absolute to enter a verdict for him.

KELLY, C.B. I will only add that this case involves a question of the gravest importance, not only to attorneys in partnership, but to all copartnerships in which the members of the firm possess only a limited authority to bind the firm by their drafts, and to all persons dealing with the members of such copartnerships. For the purposes of our decision it is only necessary to hold that, so far as regards its practical effect, a post-dated cheque is the same thing as a bill of exchange at so many days date as intervene between the day of delivering the cheque and the date marked upon the cheque.

Rule absolute.

Attorney for plaintiff: *J. M. Maddox.*
Attorneys for defendant: *Rooks & Co.*

ANTHONY *v.* THE BRECON MARKETS COMPANY.

Jan. 24.

Construction—Slaughter House—Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *s.* 126.

By the Towns Improvement Clauses Act, 1847, s. 126, no new slaughter house is to be used in places to which the act applies, without the licence of the "commissioners." By s. 45 of the Local Government Act, 1858 (which is by s. 5 to take effect in all places where the Public Health Act, 1848, has been adopted), the above clause is incorporated, and by s. 7 the local board is, for the purposes of the clause, to be deemed the "commissioners."

In Brecon, the Public Health Act, 1848, was adopted, and by s. 12 of that act the corporation was the local board.

By a private act (1 Vict. c. xii.) the corporation were empowered to carry out certain public works (including the erection of slaughter houses), and for that purpose to borrow money and to buy land. The corporation having failed to carry out those purposes, and having mortgaged their property to subscribers to the undertaking, the subscribers were by another private act (25 & 26 Vict. c. clxxxvi.) incorporated as the Brecon Markets Company; the property of the corporation of Brecon was (with certain exceptions) vested in them; powers were given to them similar to those given by the former act to the corporation, and in

1867

ANTHONY v. THE BRECON MARKETS COMPANY.

particular (by s. 65) they were empowered to erect slaughter houses with the written consent of the corporation, given under the hand of the mayor or the town clerk.

The company obtained the consent required by s. 65 of the second private act, erected a slaughter house, and demised the tolls to the plaintiff; but the corporation, acting as the local board, refused to license the use of the slaughter house, and the lessee could therefore levy no tolls. In an action brought by the lessee against the company for a breach of their agreement to let the tolls:—

Held, that the consent provided for by s. 65 of the private act neither constituted nor superseded the necessity of the licence of the corporation as the local board; that, in the absence of any evidence that the consent actually obtained was intended to operate as a licence under the Towns Improvement Clauses Act, 1847, it amounted only to a consent by the corporation under the private act; and that therefore the plaintiff was entitled to recover.

Reed in Ex Ch 16 L 399

DECLARATION, stating that the defendants agreed to let to the plaintiff certain tolls described in the particulars of letting (which were set out), as "the tolls, rents, and tollage payable by virtue of the Brecon Markets Act, 1862," and including the tolls of "the new slaughter house," for one year from 1st of January, 1865; setting out also the conditions of letting, which provided, amongst other things, that the lessee should "comply with and fulfil the bye-laws and regulations of the board of health." Breaches, that the defendants would not let to the plaintiff the tolls of the slaughter house, nor had they at any time during the term any right or title so to let them, and that by reason of their want of title, the plaintiff never had or could have, at any time during the term, the receipt and enjoyment of the tolls &c.

The defendants by their pleas denied the alleged breaches, and on these pleas issue was joined.

The cause was tried before Pigott, B., at the Brecon summer assizes, 1866. It appeared that the company had let by auction to the plaintiff the tolls of a slaughter house in Brecon, erected by them under the following special acts:—By 1 Vict. c. xii. certain powers to make slaughter houses, &c., and for that purpose to borrow money, were given to the corporation of Brecon. By 25 & 2 Vict. c. clxxxvi. (the Brecon Markets Act, 1862), which recited that various persons had subscribed money for the above objects, and were mortgagees of the corporation's property, the subscribers were (s. 6) incorporated by the name of the Brecon Markets Company, and (s. 21) the property of the corporation was, with certain speci-

fied exceptions of public buildings, &c., vested in them. By s. 65 the company were empowered, with the consent of the corporation, testified by writing under the hand of the mayor or town clerk, to provide and maintain slaughter houses upon such sites as they should think expedient; by s. 76 they were empowered to take tolls from every person slaughtering cattle there; and by s. 82 to demise the tolls. Under this act the defendants erected a slaughter house, the tolls of which they let to the plaintiff. The slaughter house, however, being built in a thickly inhabited part of the town, a licence for its use was refused by the local board, and the plaintiff was therefore unable to obtain any benefit from his demise.

In answer to this objection, the defendants proved that before erecting the slaughter house, they had obtained the written consent of the corporation under the hand of the town clerk, in conformity with s. 65 of the Brecon Markets Act, 1862; and they gave secondary evidence of this consent, the original document having been lost. They contended first, that the corporation of Brecon being the local board for Brecon, the consent so given was in fact a licence from the board of health; and secondly, that the special act, being later than the act requiring the licence of the board of health, repealed it to this extent, and substituted the consent under s. 65 for the ordinary licence; but the plaintiff maintained that this consent was only required from the corporation as the mortgagors of the land on which it was expected the slaughter house would be erected; but that it had no relation to sanitary or public purposes, and did not, therefore, supersede provisions directed to secure the public health and convenience; and he further contended that the consent was not given by the corporation acting as a local board. The arguments of the plaintiff and the defendants respectively depended on the following acts:

By 13 & 14 Vict. c. 32, confirming a provisional order of the General Board of Health, the Public Health Act, 1848, was applied to Brecon.

By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 12, it is provided, that when the act is adopted in any district exclusively consisting of the whole or part of one corporate borough, the mayor, aldermen, and burgesses of such borough (who by the Muni-

1867

ANTHONY v. THE BRECON MARKETS COMPANY.

cipal Corporation Act (5 & 6 Wm. 4. c. 76) s. 6, are the corporation and are to act through the council of the borough), shall be by the council of the borough, within such district, the local board of health under the act, and such council shall exercise and execute the powers, authorities, and duties of such local board, according to the laws for the time being in force with respect to municipal corporations in England and Wales.

By the adoption of the act, therefore, the corporation of Brecon became the local board of health.

By s. 45 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), which, by s. 5, takes effect in all places where the Public Health Act, 1848, has been adopted, the provisions of the Towns Improvement Clauses Act, 1847, as to (amongst other things) slaughter houses, are incorporated; by s. 6 a local board is substituted for the local board of health under the previous act, but is (s. 24) in corporate towns similarly constituted; and it is provided (s. 7) that, in the construction of the incorporated acts, the local board shall be deemed to be the "commissioners" or "undertakers."

The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), provides (s. 125) that the commissioners may license slaughter houses; (s. 126) that, after the passing of the special act, no new slaughter houses shall be used without the licence of the commissioners; (s. 127) that existing slaughter houses shall be registered; (s. 128) that the commissioners may make bye-laws for the regulation of slaughter houses; and (s. 129) that the justices before whom any one is convicted of an offence against the act or the bye-laws, may, in addition to inflicting the penalty provided by the act, suspend the licence of the person convicted for not more than two months, and may, on any subsequent conviction, revoke the licence, after which the commissioners may absolutely refuse a licence to such person. (1)

(1) The Fairs and Markets Clauses Act (10 Vict. c. 14) is also incorporated by 25 & 26 Vict. c. clxxxvi. s. 4; the former (s. 17) enables the "undertakers" to provide slaughter houses, and to give notice thereof; provides (s. 19) that, after the notice, no one shall slaughter in any but the slaughter house so provided, or one previously in use; and enacts (s. 18) that nothing in that act or in the special act, or in any act incorporated therewith, shall protect the undertakers from an indictment for nuisance, or from any other legal proceeding in respect of any such slaughter house as aforesaid.

The jury assessed the damages contingently at 17*l.*, but the learned judge being of opinion that the written consent rendered any further licence unnecessary, directed the verdict to be entered for the defendants, reserving leave to the plaintiff to move to enter a verdict for him for the amount of damages so assessed. A rule having been obtained accordingly,

Jan. 18. *Mellish, Q.C., Bowen,* and *Hughes,* shewed cause. They maintained the arguments urged by the defendants at the trial, and cited *Pedder* v. *Mayor of Preston.* (1)

Giffard, Q.C., and *Rees,* supported the rule. They contended that the only purpose of the Brecon Markets Act, 1862, was to establish a trading corporation, and that s. 65 must be read by the light of the preamble to the act.

Cur. adv. vult.

Jan. 24. The judgment of the Court (Kelly, C.B., Channell, and Pigott, BB.) was delivered by

KELLY, C.B. The question in this case is, whether the plaintiff, who holds certain premises used as a slaughter house under the Brecon Markets Company, the defendants, with a warranty of title, can use these premises as a slaughter house, without the licence of the local board of health, under the Towns Improvement Clauses Act, 1847. If a licence be necessary, the defendants have failed to make a good title to the premises, and the plaintiff is entitled to a verdict. It is enacted by the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 126, that no place shall be used or occupied as a slaughter house in any town within which, as in Brecon, the act is adopted, unless and until a licence for the erection thereof, and for the use and occupation thereof as a slaughter house, has been obtained from the board of health; and certain penalties are imposed for the breach of this provision of the act. No licence has been obtained in this case; but it is contended for the defendants that, inasmuch as under s. 65 of the Brecon Markets Act, the company may, with the consent of the corporation of Brecon, erect a slaughter house, and under s. 82

(1) 12 C. B. (N.S.) 535; 31 L. J. (C.P.) 291.

1867

ANTHONY v. THE BRECON MARKETS COMPANY.

may demise and let it under certain terms and conditions, and as such consent has been obtained from the corporation, and the corporation by the town council constitute the board of health at Brecon, either the consent, being given by the corporation, amounts to a licence by the board of health, or it confers an absolute right to erect and use a slaughter house, supersedes the provisions of the Towns Improvement Clauses Act, and renders a licence unnecessary.

Upon considering, however, the purview and general nature of this local act, it appears that it has been passed in order to enable a body of gentlemen interested in the town of Brecon, to form themselves into a company, to discharge the debts of the corporation, to possess themselves of the markets and the property of the corporation, which had been mortgaged to secure the debts, and to erect markets and slaughter houses, and to do other acts for the general benefit of the town, the duty to do which had formerly devolved upon the corporation. But this act has no relation whatever to sanitary measures, or to any of the purposes connected with the health or improvement of towns, which were the principal objects of the Towns Improvement Clauses Act. We see no reason, therefore, why the consent of the corporation to the erection of a slaughter house should dispense with the licence of the board of health under the Towns Improvement Clauses Act.

But some difficulty certainly arises from the corporation and board of health being in effect the same body of persons; and if the consent given had been in such a form as to enable the Court to see that it was the intention of the corporation at once to grant the consent required by the local act, and the licence required by the Towns Improvement Clauses Act, we might have held that the instrument conferred a sufficient authority. But the consent itself appears to have been lost; and the secondary evidence—that it was a very formal document, and that it expressly referred to the 65th section of the local act—rather leads us to the conclusion that it was the intention to grant the consent only, and that the corporation did not contemplate any act whatever in their capacity of the board of health, and did not really and in fact intend to grant the licence. The consent was given alio intuitu, and had relation only to the position in which the corporation stood in

1867

ANTHONY v. THE BRECON MARKETS COMPANY.

respect to the markets company, and the execution by them of the powers conferred on them by the local act.

We think, therefore, that a licence by the corporation in the character of the board of health was necessary; that the want of the licence was a defect in the title to the premises; and that the plaintiff is consequently entitled to set aside the verdict for the defendants, and to enter a verdict in his favour.

Rule absolute.

Attorneys for plaintiff: *Dobinson & Geare, for Cobb, Brecon.*
Attorney for defendants: *R. Fowke, for Games, Brecon.*

ROOTH *v.* THE NORTH EASTERN RAILWAY COMPANY.

Jan. 25.

Negligence—Railway Company—Liability as Carriers—Railway and Canal Traffic Act (17 & 18 *Vict. c.* 31) *s.* 7—*Just and reasonable Conditions—Alternative to Customer—Complete Delivery.*

A contract for the conveyance of cattle by railway, signed by the party sending them, contained the two following, amongst other, conditions:—

"The owner undertakes all risks of loading, unloading, and carriage, whether arising from the negligence or default of the company or their servants, or from defect or imperfection in the station, platform, or other places of loading or unloading, or of the carriage in which the cattle may be loaded or conveyed, or from any other cause whatsoever."

"The company will grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons with and to take care of them":—

Held, that the first of these conditions was unreasonable, and that its unreasonable character was not removed by the fact that the company, under the second condition, granted and the owner accepted, a free pass for a person who travelled with the cattle sent.

DECLARATION. First count, that the plaintiff caused to be delivered to the defendants certain cattle of the plaintiff, then received by the defendants upon the terms that the defendants would safely carry the said cattle from Boroughbridge to Chesterfield and there deliver them to the plaintiff for reward to the defendants; and all conditions, &c., were fulfilled, yet the defendants did not safely carry the said cattle or deliver the same. Second count, that the plaintiff delivered to the defendants, being public carriers of cattle,

1867

ROOTH v. THE NORTH EASTERN RAILWAY COMPANY.

certain cattle of the plaintiff upon the terms that the defendants would safely carry the said cattle from Boroughbridge to Chesterfield, and there deliver them to the plaintiff at a safe and proper place for the delivery of cattle for reward to the defendants; and all conditions, &c., were fulfilled, yet the defendants delivered the said cattle at an unsafe and improper place.

The defendants, amongst other pleas, traversed the bailments on the terms alleged. Issue thereon.

At the trial, before Montague Smith, J., at the Derbyshire summer assizes, 1866, the following facts were proved:—The plaintiff is a cattle dealer at Stretton, near Chesterfield, in Yorkshire. On the 27th of April, 1865, he attended a cattle fair at Boroughbridge in the same county, and there purchased ten heifers and five cows. He afterwards took these animals to the Boroughbridge station on the defendants' line, and there delivered them to the defendants to be carried to Chesterfield. At the same time he received and signed a ticket which contained the following statement of the terms on which the cattle were received:—"The owner undertakes all risk of loading, unloading and carriage, whether arising from the negligence or default of the company or their servants, or from defect or imperfections of the station, platform, or other places of loading or unloading, or of the carriage in which they may be loaded or conveyed, or from any other cause whatever. The company will grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons with and to take charge of them."

The cattle were loaded in two trucks, and with them the plaintiff sent a regular drover, to whom a free pass was given. They arrived at Chesterfield about nine o'clock in the evening, and upon their arrival the drover gave up his pass, together with the cattle ticket which he had received from his master, the plaintiff. The cattle were then unloaded by a railway porter in the defendants' service with the assistance of the drover, and the plaintiff's nephew who had come to meet the train. The place at which the cattle were removed from the trucks was at a siding, wholly unprotected by fence or otherwise from the line, and only capable of accommodating one truck at one time. While the second truck was being unloaded, the cattle which had been removed from the first truck

strayed on to the line, and some of them were killed by a passing train.

The learned judge asked two questions of the jury upon these facts: first, whether there was a complete and safe delivery of the cattle to the plaintiff before the accident took place? and secondly, whether the cattle were delivered at a safe and proper place? The jury found, in answer to these questions, that there had been no complete delivery, and that the place was not safe and proper. A verdict was thereupon entered for the plaintiff, and leave reserved to move to enter it for the defendants.

A rule nisi was accordingly obtained, or for a new trial, on the ground that there was no evidence to be left to the jury of any bailment to the defendants on the terms alleged, or of any breach by them of the alleged contracts; that there was a delivery to the plaintiff and at a safe and proper place; that there was a special contract by which the plaintiff undertook the risk of unloading or delivery; that the verdict was against the evidence; and that the damages, if any, should have been nominal.

Cave (*Digby Seymour, Q.C.*, with him) shewed cause. First, there was evidence that there was no complete delivery previous to the damage done to the cattle. The drover had, it is true, delivered up his pass and the cattle ticket, but the company's responsibility had not terminated. It was their duty to see the goods safely into the exclusive possession of the plaintiff's servants; *Hodgman* v. *West Midland Railway Company*. (1) Here the damage was done in the act of delivery. The process of unloading was not at an end. Secondly, the conditions are unreasonable and therefore void under the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), s. 7. The first clause, taken by itself, is clearly unreasonable, being perfectly general, and exonerating the company from responsibility for damage, however caused; *McManus* v. *Lancashire & Yorkshire Railway Company* (2); *Peek* v. *North Staffordshire Railway Company* (3); *Gregory* v. *West Midland Railway Company* (4);

(1) 5 B. & S. 173; 33 L. J. (Q.B.) 233; 10 Jur. N.S. 673.

(2) 4 H. & N. 327; 28 L. J. (Ex.) 353. 5 Jur. N.S. 651.

(3) 10 H. L. Cas. 473; 32 L. J. (Q.B.) 241; 9 Jur. N.S. 914.

(4) 2 H. & C. 944; 33 L. J. (Ex.) 155. 10 Jur. N.S. 243.

1867

ROOTH v. THE NORTH EASTERN RAILWAY COMPANY.

Simonds v. *Great Western Railway Company*. (1) But conditions, although unreasonable in themselves, may be made reasonable, if an alternative is offered to the customer; and the circumstance that the company promise to give, and in this case did give, a free pass to the plaintiff's drover, may be relied upon as making it reasonable for them to stipulate for freedom from liability for damage done to the cattle. Such a condition, however, cannot protect the company, because the alternative course which the plaintiff might have adopted was not itself just or reasonable: *McManus* v. *Lancashire and Yorkshire Railway Company* (2); *Lloyd* v. *Waterford and Limerick Railway Company*. (3) It was, if anything, for the conveyance of cattle without a drover, but still subject to the company's first condition, which is perfectly general in its terms, and applies to the carriage of cattle with or without drovers. The free pass is for the mutual advantage of both parties, as well for the greater safety of the live stock as for the greater convenience of the company. It cannot be that the acceptance of a free pass for a drover by the sender would prevent responsibility from attaching to the company for damage done by acts over which the drover neither had nor could have any possible control.

[MARTIN, B. The first clause, which applies to risks of "carriage," would protect the company from the consequences of a collision caused by the neglect of their servants.]

That is so, and is clearly unreasonable. In *Gregory* v. *West Midland Railway Company* (4) the owner of the cattle was to ride free; but that was held insufficient to free the company from liability for damage caused by their own negligence.

[KELLY, C.B. May it not be possible that such a condition may be good in part and bad in part? It is conceivable that, where a company give a free pass to a drover, they may claim immunity from the risks incident to loading and unloading, but not from those arising during the transit.]

Conditions, like this one, must be treated as a whole; or even if not, the jury have found that no safe and proper place was pro-

(1) 18 C. B. 805.
(2) 4 H. & N. 327; 28 L. J. (Ex.) 353.
(3) 15 Ir. Com. L. Rep. 37.
(4) 2 H. & C. 944; 33 L. J. (Ex.) 155.

vided for unloading the cattle. The damage, therefore, has occurred from a cause which no skill on the part of the drover could remove. The landing place was insecure, and although the company were under no absolute obligation to fence their premises from the line, in order to protect animals under their customers' exclusive control, *Roberts* v. *Great Western Railway Company* (1), they were bound to make the premises reasonably fit for the purposes for which they used them. The case of *Pardington* v. *South Wales Railway Company* (2) is distinguishable, because there the damage could have been guarded against if the drover had done his duty. [He also contended that the verdict was in accordance with the evidence.]

Field, Q.C., and *A. Wills*, in support of the rule. First, the delivery was complete when the live stock were handed over to their custodian. When the company had placed the cattle on the platform in the care of the plaintiff's servant and of his nephew, their duty as carriers was done, and they only remained liable generally to protect the animals whilst assisting the drover to remove them from the station yard, and would incur nominal damages only for not having a fence between the siding and the line. Secondly, assuming the delivery not to have been complete, the place was "safe and proper." There was no duty on the company to have a pen or fence: *Roberts* v. *Great Western Railway Company*. (1)

[MARTIN, B. That may be very true. But, in the absence of conditions, the defendants are liable, except for the act of God and the king's enemies.]

It has been doubted whether the ordinary law of carriers applies to cattle, but, granting that it does, the conditions in this case are valid and limit the company's responsibility. They are severable like bye laws which have been held so to be: *Rex* v. *Company of Fishermen of Faversham* (3); and, so far at all events as they concern the risks of loading or unloading, are reasonable. It may be that the protection given would not extend to damage done by the defendants' negligence during the carriage of the cattle, but

(1) 4 C. B. (N.S.) 506; 27 L. J. (C.P.) 266.
(2) 1 H. & N. 392; 26 L. J. (Ex.) 105.
(3) 8 T. R. 352.

1867

ROOTH v. THE NORTH EASTERN RAILWAY COMPANY.

the word "carriage" may be rejected. It may also be conceded that, taken alone, the first clause is unreasonable. But reading it without the word "carriage," and in conjunction with the clause offering a free pass for his drover to the sender, it is reasonable. The plaintiff accepted this pass; he might, if he pleased, have declined it when the company would have had to take the risks of loading and unloading on themselves. His acceptance of it constitutes a sufficient consideration for an indemnity given by him to the company against those risks. As regards them the plaintiff became the insurer. [They also contended that the verdict was against the evidence.]

KELLY, C.B. I am of opinion that this rule should be discharged. Several points have been made during the argument, of which the first is as to the first condition under which the defendants agree to carry cattle. It is contended that this condition is in parts unreasonable. On the other hand, it is said that it may be good in part and bad in part, and that the part material to this case is good and reasonable; or, again, even if this be not so, that the subsequent clause in the conditions, offering free passes to persons having the care of live stock, makes the first condition, though in itself unreasonable, binding on the plaintiff. Now, I desire to abstain from saying whether this condition may or may not be divisible in law, so as to be good in one part, and bad in another. The substantial question is, whether the subsequent paragraph in the conditions, respecting free passes to drovers, makes it reasonable on any construction. The authorities cited on behalf of the plaintiff shew that, in order to disentitle the owner of the cattle carried to complain, a *choice* must be left to him to accept or to refuse the offer of the company. If he accept it, he is disentitled. If he reject it, the company are thrown back upon or left to their common law liability. In the present case, I cannot see that any alternative was offered to the plaintiff. There is simply an offer to him to give a free pass to any persons whom he may choose to send with his cattle. The choice of accepting or refusing to have his goods carried subject to the first condition is not given to him. Then, secondly, I regard the first condition as altogether void, even assuming the

conditions may be read together. I am by no means, however, ready to hold it unreasonable that the company should provide that any owner who was willing to do so should undertake the risk of loading and unloading. If they think fit to commit this duty to the owner, and he chooses to undertake it, it does not seem unreasonable that there should be a stipulation relieving the company from liability for damage incurred during the process of loading or unloading. But it is impossible to contend that a stipulation is binding which secures the company against damage arising from all risks of loading, unloading, and carriage, however caused, whether from the negligence of their servants, the imperfection of their station accommodation, or otherwise. Such a provision cannot limit their common law duty to take reasonable care of their stations, and to see that those places over which the cattle have to go on their way to or from the company's carriages are in a condition to ensure to those cattle a safe means of transit. If, therefore, all that the defendants contend for is established, I do not think it could be said that they were not bound to supply a safe and proper place for the plaintiff's animals to be unloaded; and in this case they did not do so.

With regard to the other points in the case, it is said that the delivery was complete, and therefore that the company's liability was at an end. But, granting that in a certain sense there had been a delivery, still, that circumstance does not discharge the company from their duty of providing a safe and proper means for these cattle to cross the line, and leave the premises. The sole question really is, whether the company had fulfilled their common law obligation, which nothing, in my opinion, had abridged, of providing a safe mode of exit and transit. That question was left in a twofold manner to the jury. "Was there," they were asked, "a complete and safe delivery?" and, "Was there a proper place to deliver?" The one question involves the other. The question, that is, of safe and complete delivery involves that of whether a safe and convenient place to deliver was provided. The jury found that there was no such delivery, and no proper and convenient place, and I see no reason for disturbing their verdict.

1867

ROOTH v. THE NORTH EASTERN RAILWAY COMPANY.

I should add a word as to the case relied on by the defendants, of *Roberts* v. *Great Western Railway Company*. (1) There, the declaration contained an express allegation of an absolute legal obligation to provide a fence to a yard near a railway station, and it was held impossible to say that that special precaution must necessarily be taken. That was the ground of the decision. But in this case the duty of providing some sort of safeguard is not alleged specifically, but in general terms. All the points, then, made by the defendants fail. This rule, therefore, should be discharged.

MARTIN, B. I am of the same opinion. If there had been no condition, the state of affairs would have been simply a bailment of cattle to the defendants by the plaintiff, he sending a man to look after them during the journey. Then, at Chesterfield, a servant of the defendants came and assisted in the operation of delivering the cattle. But what took place there, was not a "delivery." If the articles carried had been inanimate, it might have been different. But here, the goods were live animals, and could not be delivered in the same manner. They were simply brought out of the truck on to the platform, and, though the plaintiff's servant was there, and may have touched them, there was, in my opinion, no such delivery to him as to exonerate the company. Then, what is the common law consequence of the plaintiff's man being in charge? The case is similar to that of the nurse and child, where the Court of Exchequer Chamber held the railway company free from liability. But there the child was in the exclusive charge of the nurse, and she was herself guilty of negligence. (2) Here the drover was not in exclusive charge of the cattle, and was guilty of no negligence. The mere fact of his presence cannot make any difference in the common law liability of the company. Then, does the condition make any difference? I think not. Taken alone, it is clearly unreasonable; and, assuming it to be divisible, and reading it with the third condition, which provides that the person having charge of the cattle is to have, if

(1) 4 C. B. (N.S.) 506; 27 L. J. (C.P.) 266.

(2) The case referred to seems to be *Waite* v. *North Eastern Railway Company*, 28 L. J. (Q.B.) 258.

he pleases, a free pass, I do not think it affects the common law liability, unless the person in charge of the cattle was guilty of negligence. I concur altogether, both on this point and on the others, with the Lord Chief Baron.

CHANNELL, B. I am also of opinion that this rule should be discharged. The defendants would have done a great deal if they could have established that there had been a complete delivery. But it does not follow that there was such a delivery, because a person appointed by the plaintiff was present to receive the cattle. The question was for the jury, and they found that the cattle were not safely and completely delivered, and that there was no safe or convenient place provided for their delivery. We must take it, therefore, that there was no delivery, and, in consequence, no termination of the company's liability as common carriers. Then comes the question as to the special condition which arises on the plea traversing the bailment on the terms alleged. The contract containing the condition we are to take as signed by the plaintiff, and, if binding, the defendants can say that there is a variance between the contract declared on and that proved. The statute (17 & 18 Vict. c. 31), s. 7, however, has enacted that no condition like this shall bind unless it is reasonable, and if it be unreasonable in this case, the plaintiff may declare on the common law liability of the defendants as carriers. Now, it is conceded that, if we are to take the first paragraph of the conditions by itself, according to the decided cases, it is unreasonable. But then it is said to be reasonable in two ways: first, on the ground that a part of the first paragraph is severable from the rest of it, and that what remains after the severance is reasonable. If it were necessary to decide the point, I should be disposed to hold the condition not capable of being thus severed. The whole of it applies to the same and not to different subject matters, viz. to the carriage of cattle. The word "carriage," therefore, cannot be taken out. Suppose, however, that it could be, still, even in that form I regard it, when standing alone, as unreasonable.

Secondly, it is contended that the paragraph lower down in the conditions is to be read with it, and that, taking both of

1867

ROOTH v. THE NORTH EASTERN RAILWAY COMPANY.

them together, the whole is not unreasonable. Now, the company cannot be placed in a better position than if we read that paragraph first, and the first after it, when the whole would run somewhat as follows: "Inasmuch as the company offer a free pass to any person sent to take care of the cattle they may carry, they will not be liable, when that pass is accepted, for any risks, however caused, arising from loading, unloading, or carriage." But even then the condition would be unreasonable, and if the word "carriage" is left in its place, there would be no answer to the suggestion made by my Brother Martin, that the company would not be liable for damage resulting from a collision caused by the negligence of their own servants. Again, excluding that word, and reading the two conditions in the manner I have suggested, which is most favourable to the company, the unreasonableness, in my opinion, is not got rid of. There is no consideration for an indemnity given to the company by the plaintiff for keeping an imperfect and insecure station. On all points, therefore, I think a satisfactory answer can be given to the defendants' contention, and accordingly the rule must be discharged.

PIGOTT, B. I have little to add to the opinions of the other members of the Court, in which I entirely agree. As to the delivery, we must look at the nature of the articles to be delivered. They were cattle, contained in two trucks. One only could be turned out at a time, and the cattle contained in it, therefore, had to wait on the station, and could not be taken away by the plaintiff's servant, until the second truck had been pushed up and unloaded. Under these circumstances, the defendants cannot be said to have "delivered" the cattle, and the jury were, I think, right in finding that there had not been "a complete delivery." Again, was the place for delivery "safe and proper"? The jury have found that it was not, and although I should not have thought the contrary verdict wrong, there is plenty of evidence to support it as it stands. With regard to the special condition, taken alone it is clearly unreasonable; and I do not think it can make any difference, under the circumstances of this case, that a servant of the plaintiff was permitted to travel free of charge with the cattle train. He did all he could, and had no control whatever over the cause of the

accident. The defendants therefore, in my opinion, are liable in this action.

Rule discharged.

Attorneys for plaintiff: *Burt & Stevens, for Cutts, Sheffield.*
Attorneys for defendants: *Beale, Marigold, & Beale.*

BRAUN *v.* WELLER.

Feb. 12.

Deed under the Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134, *s.* 192)—*Release*—*Action on Judgment*—*Time for Pleading*—*Practice.*

In a former action by the plaintiff against the defendant, the defendant pleaded never indebted, but afterwards withdrew his plea, on an agreement that judgment should not be signed before the 8th of May. On the 7th of May, the defendant registered a deed under the Bankruptcy Act, 1861, s. 192, containing a release from his creditors, but he did not plead it in the action. On the 8th, the plaintiff signed judgment. In an action brought on the judgment:—

Held, that the interval between the registration of the deed and the signing of judgment did not give the defendant such an opportunity of pleading the deed as to disable him from availing himself of it in the second action.

Held, also, that the agreement, under which the plea of never indebted was withdrawn, precluded the defendant from pleading any other plea in the former action, and that he might, therefore, now avail himself of the deed.

Quære, whether, supposing the defendant had had the opportunity and power of pleading the deed, and had neglected to do so, he could now avail himself of it? (1)

SPECIAL CASE, stating the following facts. (2)

This was an action brought upon a judgment, recovered by the plaintiff against the defendant in this court.

(1) See *Staffordshire Banking Company* v. *Emmott*, Weekly Notes, p. 71, February 23rd, 1867; to be reported.

(2) The special case was stated after issue joined, but the pleadings were not made a part of the case. The substance of them was as follows:—

Declaration—on a judgment recovered by the plaintiff against the defendant on the 8th of May, 1866.

Plea—setting out, with the usual averments, a deed registered under the Bankruptcy Act, 1861, s. 192, which contained a release of the defendant by his creditors.

Replication—that the deed was executed, &c., and all other the matters and things in the plea mentioned, necessary to make the deed binding on the defendant's creditors under the Bankruptcy Act, 1861, were done and happened, if at all, before the 8th of May, 1866, and before the judgment sued on was recovered, and that the said matters and things, and grounds of defence, in the plea mentioned, might

1867

BRAUN v. WELLER.

The former action, which was for goods sold and delivered, and on accounts stated, was commenced on the 5th of April, 1866. On the 25th of April the defendant pleaded the general issue, but on the 30th withdrew his plea, upon the stipulation that judgment was not to be signed until the 8th of May following.

On the 7th of May, a deed, executed by the defendant (as debtor) and assented to by the statutory number of creditors, was duly registered under s. 192 of the Bankruptcy Act, 1861, and by it the creditors of the defendant released him from all debts, demands, and suits.

Notice of the registration of the deed was, on the same day, given to the plaintiff's attorney, the plaintiff not being an assenting creditor, and on the following day (the 8th of May) it was gazetted.

On the 8th of May the plaintiff signed judgment.

The question for the opinion of the Court was stated to be whether the plaintiff was entitled to recover in the present action.

Jan. 16. *J. Brown, Q.C.*, for the plaintiff. It appears upon the case that the deed contained a release; the plaintiff contends, therefore, that the defendant cannot now avail himself of it, if he had any opportunity of pleading it in answer to the original action. The dates shew that he had an opportunity: for the deed was registered on the 7th of May, and judgment was not signed till the 8th; the defendant had therefore the whole time up to 11 o'clock on the 8th, when the office opened, and before which judgment could not be signed: *Connelly* v. *Bremner*. (1) The substantial question therefore is, whether the case does not fall within the general rule laid down in *Bradley* v. *Eyre*, and *Bradley* v. *Urquhart* (2), that to an action or a sci. fa., on a judgment, the defendant cannot plead in bar anything which he could have

---

and should have been pleaded in bar to the former action, but that the plaintiff wilfully neglected and omitted so to plead them. The plea then stated that after the happening of the said matters, and the omission to plead, judgment was recovered; and it set out the record in the former action, by which it appeared that judgment was recovered for default of a plea. Issue.

(1) Law Rep. 1 C. P. 557.

(2) 11 M. & W. 432, 456.

pleaded to the original action. This rule was applied to a plea of a certificate in bankruptcy, in *Todd* v. *Maxfield* (1), and so far as s. 161 of the Bankruptcy Act, 1861, is concerned, that case is a direct authority in favour of the plaintiff; for that section does not for this purpose differ from the corresponding section of the two previous acts (6 Geo. 4, c. 16, s. 121; and 12 & 13 Vict. c. 106, s. 200). But further, it was lately held in this court, that the same rule deprived a debtor who had executed a deed similar to the present one, of the protection from process to which s. 198 would have otherwise entitled him: *Whitmore* v. *Wakerley*. (2)

[KELLY, C.B., referred to *Hartley* v. *Mare* (3), and to the discussion of that case on the argument in *Staffordshire Banking Company* v. *Emmott*. (4)]

In the case of *Hartley* v. *Mare* (3), the argument in support of the application by the inspectors turned principally on the fact that the objection was only valid against the debtor, and that his default could not affect the inspectors, who had never had any opportunity to plead the deed.

[KELLY, C.B. But the judgment proceeded on the ground that the 198th section deprived the creditor of power to realize his judgment. There is no distinction made in the section between deeds which contain a release, and those which do not, nor between the position of the debtor himself in making such an application, and that of his inspector or trustees. The language of the section is prohibitory of the creditor making any process available. The plaintiff is in the same position as if he had executed a release at common law to the defendant.

CHANNELL, B. Suppose the plaintiff had actually executed the release, and then gone on and signed judgment, could the defendant have then claimed the benefit of the deed?]

It is submitted that he could not.

[KELLY, C.B. Would it not, in such a case, be a fraud on the debtor, and upon the other creditors, that, after being a party to the arrangement, the plaintiff should issue execution against the goods to which the debtor must look for payment of that composi-

(1) 6 B. & C. 105.
(2) 3 H. & C. 538; 34 L. J. (Ex.) 83.
(3) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187,
(4) Weekly Notes, p. 71, February 23rd, 1867; to be reported

1867

BRAUN v. WELLER.

tion which the plaintiff and the other creditors had mutually agreed to accept?]

Great injustice would be done by allowing the defendant to adopt this mode of proceeding, for, if he had pleaded the deed, the plaintiff would, under r. 22 of Trinity Term, 1853, have been entitled to his costs: Chitty Pr. vol. ii. p. 920, 12th ed.; whereas, by his abstaining from raising this defence, the plaintiff has incurred costs which he can neither prove under the deed nor sue the debtor for: *Willett* v. *Pringle* (1); *Ex parte Hill* (2); *Ex parte Poucher* (3); and the plaintiff might be thus affected, although the deed were registered before declaration, and although issues of fact were afterwards tried, and verdict and judgment obtained upon them.

[CHANNELL, B. Suppose no case had been stated, and the defendant had been put to plead these facts, in what form would his plea have been framed?]

He could have framed no plea which would not have been open to the objection that he might have pleaded it to the original action. No plea could be based on s. 198, for it does not discharge the debt, or the judgment, or execution.

[The Court inquired whether the case was to be treated in the same way as if it were a motion by the debtor to direct the sheriff to withdraw from possession in an execution issued upon the former judgment.

J. Brown, Q.C., replied, that the question was, whether the plaintiff was entitled to maintain the present action, or whether the defendant could oppose any legal or equitable defence to it.

A. L. Smith replied, that the question was, whether the plaintiff could recover the money.]

A. L. Smith, for the defendant, relied upon the provisions of s. 198, and contended that the present action was brought in fraud of the act. If there had been any good cause for allowing the former action to proceed, the plaintiff might have applied to the Court of Bankruptcy, under s. 198, for leave to proceed and to obtain execution; but by his omitting to do so, and bringing the present action, he shews that he knew his application would be unsuccessful.

(1) 2 B. & P. (N.R.) 190.
(2) 11 Ves. 646; 2 B. & P. (N.R.) 191 n. (3) 1 Gl. & J. 385.

Hartley v. *Mare* (1) is in substantial contradiction to *Whitmore* v. *Wakerley* (2), and supports the view that the operation of s. 198 is not affected by the fact of the registered deed containing a release. The defendant's reasoning is analogous to that on which it was held that, although ordinarily an action may be brought in the superior courts upon a judgment in an inferior court, yet no action can be maintained on a judgment recovered in a county court, because it would be contrary to the policy and intention of the county court acts. *Berkeley* v. *Elderkin* (3); *Austin* v. *Mills.* (4) The present attempt is equally in contravention of the Bankruptcy Act, 1861. Admitting that the plaintiff was entitled to go on and obtain judgment, he did so at his peril; he could not obtain execution; and, therefore, he is not entitled to maintain this action. With respect to costs, he could probably have obtained them under the deed; *Lewis* v. *Piercy* (5) is an authority contrary to those cited on the other side. Assuming, however, that the defendant ought, if possible, to have pleaded the deed, there was here no sufficient time; and further, on the withdrawal of the plea, it was an implied term of the agreement that no further plea should be pleaded.

J. Brown, Q.C., in reply.

Cur adv. vult.

Feb. 12. The judgment of the Court (Kelly, C.B., Channell and Piggott BB.) was delivered by

KELLY, C.B. This is an action upon a judgment, and the form of the question submitted to the Court upon a special case is, whether the plaintiff is entitled to recover; by which we understand that the Court is called upon to determine whether the plaintiff can enforce his judgment by execution against the defendant; and we are of opinion that he cannot.

The defendant was indebted to the plaintiff in the sum of 13*l.* 7*s.*, and the plaintiff commenced an action to recover this sum, and the defendant at first pleaded the general issue; but afterwards on the 30th of April, 1866, by the consent of both parties the plea was withdrawn, and judgment was to be signed on the 8th of May. On the 7th of May a deed of composition in strict

(1) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187.
(2) 3 H. & C. 538; 34 L. J. (Ex.) 83.
(3) 1 E. & B. 805; 22 L. J. (Q.B.) 281.
(4) 9 Ex. 288; 22 L. J. (Ex.) 263.
(5) 1 H. Bl. 29.

1867

BRAUN v. WELLER.

accordance with the provisions of the 192nd section of the Bankruptcy Act, 1861, was duly registered in bankruptcy, and notice of the deed was given on the same day to the plaintiff, and the deed was advertised in the *London Gazette* on the 8th of May.

Under these circumstances, it is contended on behalf of the defendant that the registration of the deed disentitles the plaintiff to enforce his judgment by any execution, and that the question submitted to the Court must be answered in the negative. The plaintiff, however, contends that inasmuch as the defendant might have pleaded the deed in bar to the further maintenance of the action before the signing of judgment on the 8th of May, he cannot now avail himself of it to defeat an execution by the plaintiff on the judgment that he has obtained.

We think it is a sufficient answer to this argument that, although it may have been physically possible for the defendant to have put in a plea late on the afternoon of the 7th, or early on the 8th of May, before the judgment was signed, this is not such an opportunity of pleading a plea as a defendant can be held bound to make available, even supposing that his omission to plead disentitles him in point of law to the benefit of ss. 197 and 198 of the Bankruptcy Act. But we are also of opinion that, had there been time for the pleading of this plea by the defendant, he was precluded by the terms of the agreement with the plaintiff, under which he withdrew his plea of the general issue, from pleading any plea at all, or otherwise from preventing the defendant from signing judgment on the 8th of May.

It is therefore unnecessary in this case to determine whether under any circumstances, the omission to plead in bar to an action deprives the defendant of any benefit to which he may be entitled under the provisions before referred to, and to be found in ss. 192—198 inclusive, of the act.

And we are of opinion that upon the facts stated, the plaintiff is not entitled to enforce this judgment, and that the question submitted to the Court must be answered in the negative.

Judgment for the defendant.

Attorneys for plaintiff: *Spyer & Co.*
Attorneys for defendant: *Miller & Stubbs.*

SELLIN *v.* PRICE. 1867

Feb. 12.

Deed under Bankruptcy Act, 1861 (24 & 25 *Vict.* 134), *s.* 192—*Material Addition to Deed after Registration—Schedule of Creditors.*

A deed was registered under s. 192 of the Bankruptcy Act, 1861, which was expressed to be made between the debtor, a surety, and scheduled creditors. At the time of registration no schedule was annexed, but a schedule was afterwards added by the debtor:—

Held, that the addition of the schedule vitiated the deed.

THIS action was commenced on the 2nd of June, 1866, under the Bills of Exchange Act, 1855, and judgment was signed on the 18th. On the 16th the defendant executed a deed under s. 192 of the Bankruptcy Act, 1861, which purported to be made between the debtor of the first part, a surety of the second part, and "the several persons whose names or firms are set forth in the schedule hereto, hereinafter styled creditors, of the third part." It recited that the creditors had agreed to accept a composition of 5*s.* in the pound, to be secured by the joint and several promissory notes of the debtor and his surety; that the composition to be so secured was payable to non-executing and non-assenting creditors; and that the promissory notes had been deposited with the surety, to be held by him in trust to deliver the same to such last-mentioned creditors respectively on demand, as the surety by the deed acknowledged. In consideration of the premises each of the said creditors of the debtor, who should have executed or assented to, or who should be bound by, the deed, released the debtor absolutely, reserving rights against sureties. It was declared that the deed was intended to operate under s. 192 of the Bankruptcy Act, 1861. No schedule was annexed.

The deed was registered on the 20th of June, and gazetted on the 22nd.

On the 28th the defendant's goods were seized, under a fi. fa. issued at the suit of the plaintiff, and on the 3rd of July the defendant took out a summons at chambers to set aside the execution. Upon this summons an order was made by Willes, J., directing the sheriff to withdraw, on the defendant's paying into Court the sum of 30*l.* to abide the order of the Court.

1867

SELLIN v. PRICE.

At the hearing of the summons various objections were raised by the plaintiff to the validity of the deed, and a doubt was suggested by the learned judge, whether the absence of a schedule did not vitiate it, since without a schedule there were no parties of the third part. A schedule was afterwards added to the deed.

The money having been paid in under the above order, the defendant, after the addition of the schedule, obtained a rule for the payment of the money out of Court to him, against which

Nov. 24. *Pinder* shewed cause. (1) He contended that by the reference to the schedule in the deed, the schedule became a material part of it, and the deed was therefore vitiated by the addition: *Weeks* v. *Maillardet.* (2) He further contended that, without a schedule the deed would be bad for want of parties; and, thirdly, that the provisions of the deed were unreasonable, for either it gave no benefit to any of the creditors, since it contained neither covenant nor assignment; or, if there was an implied covenant, it was one on which only executing or scheduled creditors could sue, and created an inequality.

H. Atkinson, in support of the rule, contended that the deed was good without the schedule, since it was for the benefit of all the creditors; none could sue, but the surety was a trustee for all; and this being so, the schedule was immaterial, and the deed not affected by its addition. He cited *Scott* v. *Berry* (3) and *Blumberg* v. *Rose.* (4)

Cur. adv. vult.

Feb. 12. The judgment of the Court (Kelly, C.B., Martin and Pigott, BB.) was delivered by

KELLY, C.B. The question in this case is, whether a composition deed of the 16th of June, 1866, is valid and binding upon the creditors within the provisions of the Bankruptcy Act, 1861.

(1) This rule was first argued on November 13 (*Pinder* shewing cause in the first instance), and the deed was then treated as if the schedule was part of it at the time of registration. The Court reserved judgment; but, before judgment was delivered, the plaintiff having discovered that the schedule was subsequently annexed, *Pinder* obtained leave to re-argue the case, and it was accordingly re-argued as here stated.

(2) 14 East, 568.

(3) 3 H. & C. 966; 34 L. J. (Ex.) 193, 11 Jur. (N.S.) 510

(4) Law Rep. 1 Ex. 232; 12 Jur. (N.S.) 378

1867

SELLIN v. PRICE.

The deed purports to be made between W. T. Price (the debtor) of the first part, Frederick Price of the second part, and "the several persons whose names or firms are set forth in the schedule hereto, hereinafter styled creditors, of the third part." It recites that the debtor, being unable to meet his engagements with his creditors, had proposed to pay them a composition of 5*s.* in the pound, by means of promissory notes, to be signed by W. T. and F. Price respectively, and which notes the creditors had agreed to take in full discharge of their debts; and that the said composition to be secured by the said promissory notes was payable to creditors who had not executed or assented to the said deed; and that such notes had been deposited with F. Price, "to be held by him in trust to deliver the same respectively to such last-mentioned creditors respectively on demand."

The deed then provides that, in consideration of the premises, each of the said creditors of the said W. T. Price, who should have executed or otherwise assented to, or should be bound by the said deed, did thereby release and discharge the said W. T. Price, and his estate and effects, from all debts and sums of money due by him to such creditors respectively. This deed was executed by W. T. Price and by F. Price, but not by any creditor or creditors, or any person or persons purporting to have been parties of the third part; and neither at the time of the execution nor of the registration of the deed had any person or persons executed it, except W. T. and F. Price; nor was any schedule annexed to the deed, or in existence, at either of those periods. But a schedule, containing the names of a number of creditors and the amount of their debts, was at a subsequent time appended or attached to the deed.

It is alleged generally in the affidavit of the defendant that the deed was, prior to the registration thereof, duly assented to by the requisite majority of the creditors, but neither the schedule referred to, nor any paper containing the assent in writing of such majority, is made an exhibit or brought before the Court.

Under these circumstances, the question is, whether the deed was a bar to a debt claimed by a creditor who had neither executed nor assented to it; and we are of opinion that it was not.

Three objections were made to this deed:

1867

SELLIN v. PRICE.

First, that the affidavits are not such as to satisfy the Court that the deed was assented to in writing by the requisite majority of creditors. Inasmuch as the schedule purporting to have been annexed to the deed was not annexed to it until long after its execution and registration, and neither that schedule, nor any paper containing the assent in writing of any creditors is before the Court at all, we are left in doubt whether some of the requisite assents may not have been given by this schedule, and are, therefore, not satisfied that they were given in due time, and we must therefore hold the deed upon this ground to be invalid.

Secondly, we are of opinion that the annexation of the schedule to the deed after execution and registration, the schedule having thus become part of the deed itself, altered the deed in a material particular, and made it void.

Thirdly, it is objected to the deed that certain creditors, whose names are set forth in a schedule thereto, purport to be made the parties to the deed of the third part; and it appears that no schedule was attached to the deed at all, and that no one creditor of the third part executed the deed, and that there was therefore no deed to which any subsequent assent in writing of the majority of the creditors could apply.

The first and second of these objections being fatal to the deed, it is unnecessary to consider the last; and we think, upon the grounds already referred to, that the rule must be discharged.

Rule discharged.

Attorneys for plaintiff: *Treherne, Whites, & Renard.*
Attorneys for defendant: *Eyre & Lawson.*

CODDINGTON AND OTHERS *v.* PALEOLOGO AND OTHERS. 1867 Jan. 31.

Contract of Sale—Construction—Condition Precedent.

The plaintiffs contracted to supply the defendants with goods, "delivering on April 17th, complete 8th May." The plaintiffs made no delivery on the 17th, and the defendants on the following day rescinded the contract, and refused subsequent tenders of the goods. The plaintiffs having brought an action for non-acceptance :—

Held, that, if on the true construction of the contract the plaintiffs were bound to commence the delivery on the 17th of April, the defendants were entitled to rescind for the failure to deliver on that day; but

Quære, whether the contract bound the seller to commence delivery on the 17th of April?

Held, per Kelly, C.B., and Pigott, B., that it did not bind the seller to commence delivery on the 17th, but only to deliver at reasonable times between the 17th and the 8th; per Martin and Bramwell, BB., that it did bind the seller to commence delivery on the 17th.

ACTION for not accepting goods, to be made and delivered by the plaintiffs to the defendants, according to a contract set out in the declaration.

The contract was as follows :—"Manchester, 21 March, 1866.—To Messrs. Coddington & Sons. Copy of order contracted with you this day. For white 900 L cloths, 44/32 yards, 13 × 12, 8½ lbs., made up in laps. Cloth as before. Heading 3 Red in both ends, leaving 6 inches of a tab, goods for bleaching. If the headings are not fast, will be returned white to the makers or agents, and the bleaching charged to them. *Delivering on April* 17; *complete* 8 *May*. Terms, 1½ % in 30 days. This is made in duplicate, each party keeping one.

(Signed) "Duca Paleologo & Son."

Third plea, that the plaintiffs were not ready and willing to deliver the goods according to the contract.

Issue thereon.

No goods were delivered on the 17th of April, and on the following day the defendants wrote to rescind the contract, alleging that their customers had cancelled their orders. Deliveries, amounting altogether to the whole 900 pieces, were tendered on the 23rd, 26th, and 30th of April, and on the 3rd of May, and were refused.

1867

CODDINGTON v. PALEOLOGO.

At the trial of the cause before Martin, B., at the Manchester summer assizes, 1866, evidence was given to the effect that the practice was, under similar contracts, to begin as soon as possible after the first day named, and to complete on the last day named; but that there was no rule as to the quantity of a delivery. A verdict was found for the plaintiffs for 240*l.*, with leave to the defendants to move to enter a verdict for them. A rule having been obtained accordingly,

Nov. 23. *James, Q.C.*, and *Jones, Q.C.*, shewed cause. The Court must put a reasonable construction on the contract, and interpret it so as to effectuate the probable intention of the parties. On the one side the manufacturer desires to fill up his time, and to have power to use his opportunities for manufacturing and delivery, and to adjust his performance to them; on the other side, the merchant desires to have a date fixed by which he will certainly have his whole order completely fulfilled. The date of completion is, therefore, fixed rather in the interest of the merchant, but the date of commencement is fixed in the interest of the manufacturer. The essential terms, therefore, of the contract are, that the manufacturer is entitled to commence delivery, and the merchant bound to accept, on the first day named; and that the manufacturer is bound to complete on the last day named. The mode of delivery within those limits will be that which is indicated by the evidence, deliveries in reasonable quantities, at reasonable intervals. But this mode of delivery is not an essential term, and therefore not a condition precedent; its breach does not determine the contract, but only gives ground for a cross action. The substance of the contract is fulfilled, and the main intention of the parties realized: *Boone* v. *Eyre*. (1) If the rigorous construction contended for by the defendants is adopted, it must be applied throughout, and the contract will be fulfilled if any part is delivered on the first day, and the rest delivered on the last day, for the contract is silent as to any intermediate deliveries. The intimation of opinion by Channell, B., at the end of his judgment in *Hoare* v. *Rennie* (2) is in favour of the plaintiffs' contention, for if the subsequent deliveries in that case would have been good, not-

(1) 1 H. Bl. 273, *n*. (2) 5 H. & N. 19; 29 L. J. (Ex.) 73.

withstanding the breach of contract in the first monthly shipment, the defendants here were not entitled to refuse the subsequent deliveries merely because of the default on the 17th of April.

Temple, Q.C., and *Holker*, in support of the rule. It is admitted that the plain English of the contract is, that something shall be done towards the fulfilment of the contract on the first day named, and that the opposite construction must be reached by conjecture. But if conjecture is used, it may be rather said that all delay is for the benefit of the vendor, and promptitude for the benefit of the vendee; that each stipulation must be construed in favour of the party for whose benefit it has been introduced, and that the vendee is therefore entitled to have a delivery on the first day named. That delivery must be according to the custom of the trade, that is, a substantial delivery. The decision in *Hoare* v. *Rennie* (1) is in favour of the defendants, and proceeds not so much on the ground of a distinction between stipulations and conditions precedent, as on the ground that the party to a contract who has himself broken it cannot enforce it against the other side. They cited *Duncan* v. *Topham* (2); *Cox* v. *Todd* (3); *Wilkinson* v. *Gaston* (4); and *Behn* v. *Burness*. (5)

Cur. adv. vult.

Feb. 12. The following judgments were delivered:

BRAMWELL, B. I agree with the defendants' construction. It has the merit of being literal, and I think reasonable. The agreement is, the seller shall not be bound to deliver before the 17th of April, nor the buyer to take; but delivering and taking shall begin on the 17th, and finish by the 8th May. The plaintiffs' construction is not literal, and I think not reasonable. It is, "The buyer must begin to receive on the 17th. If I choose, I need not deliver then, but may afterwards, provided I complete on or before the 8th of May." It seems to me this would enable the seller to postpone delivery till the 8th; for, if he is not to deliver on the 17th, why on the 18th, 19th, and so on? If it is said he must deliver within a reasonable time after the 17th, what

(1) 5 H. & N. 19; 29 L. J. (Ex.) 73.
(2) 8 C. B. 225.
(3) 7 D. & R. 131.
(4) 9 Q. B. 137.
(5) 3 B. & S. 751; 32 L. J. (Q. B.) 204.

1867

CODDINGTON v. PALEOLOGO.

criterion of reasonableness can be applied? Besides, if that were so, the natural words would have been, "delivering between the 17th and 8th inclusive." And, further, it would have been natural for the buyer to say, "Let me have a fixed day, and, instead of saying between the 17th, &c., which you may say would give you four, five, or ten days after, say certainly the 18th or 20th, or some fixed day." Further, if the 17th is not a binding day on the seller to deliver, it can only have been introduced to bind the buyer to receive. But a buyer is only too glad to receive as early as possible, provided payment is not thereby expedited, which I understand is not the case here. The notion of the buyer not having convenience to receive, and that provision was made against his being compelled to do so is, I think, not a practical one.

MARTIN, B. This case was tried before me at the last summer assizes at Manchester. The facts are as follows:—On the 21st of March, 1866, the plaintiffs and defendants entered into a written contract for the purchase and sale of 900 white L cloths of certain lengths and quality, and on certain terms. The term as to delivery was "delivering on 17th April, complete 8th May." No cloth was delivered or tendered upon the 17th April, and on the 18th the defendants wrote that they threw up the contract by reason of a non-delivery on the previous day. The plaintiffs afterwards, and before the 8th May, tendered the whole of the cloths, viz. 250 pieces on the 23rd April, 250 pieces on the 26th, 250 pieces on the 30th, and the remainder on the 3rd May. The defendants refused to accept any of them, and this action was brought to recover damages for the non-acceptance. An attempt was made at the trial to prove a trade custom bearing upon the case, but it failed, and the rights of the parties depend exclusively upon the above facts.

It is quite clear that if the contract did render it obligatory upon the plaintiffs to deliver a portion of the cloths upon the 17th April, the defendants are discharged from it, for the simple reason that the non-delivery on the 17th rendered it impossible for the plaintiffs to perform the entire of their contract, and the defendants were under no obligation to accept a partial performance of it. Speaking technically, the plaintiffs could not prove an essen-

tial averment in their declaration, that they were ready and willing to perform, &c.

The question therefore, resolves itself into this, did the contract impose upon them this obligation? In my opinion it did, because I think it is expressed in the contract that there shall be a delivery upon that day. The contract is in writing, and the rule of law is that it speaks for itself; it can neither be added to, nor contradicted, nor varied. Again, the construction is to be according to the plain and ordinary grammatical meaning of the words used. It is immaterial whether the mode and times of delivery be important or unimportant, whether they be of the essence of the transaction or not; if a delivery upon the 17th of April be contracted for, no court of law can dispense with it.

If my view of the contract be a true one, according to *Startup* v. *Macdonald* (1), a delivery or tender before midnight on the 17th would satisfy it, but a tender after that hour would not. Construing the words used by the parties, I think a tender of the whole 900 cloths on the 8th of May would not do. I think the contract contemplated a completion on that day after a previous delivery of part. Again, I cannot think the words can be read as delivery to be made between the 17th of April, and 8th of May, both days inclusive, and that delivery on the 23rd, 26th, and 30th of April, and 3rd of May, would satisfy them. So to hold appears to me to add to, indeed contradict, the words "*delivering on the* 17*th.*" I think they express that part delivery was to be made on the 17th, and that no judicial construction can dispense with it. It was asked by the learned counsel for the plaintiffs, would a tender of one piece on the 17th have satisfied the contract? I answer no: such tender would have been altogether nugatory and delusive; the delivery to satisfy the contract would in my opinion have been a reasonable quantity having reference to the entire bulk, and to the interval of time between the 17th of April and 8th of May, and this of necessity would be a question for the jury. On the other hand it was argued by the counsel for the defendants that a delivery on the 17th might have been of essential importance, as the cloths might have been intended for shipment in a vessel chartered to sail on the 18th. I

(1) 6 Man. & G. 593.

1867

CODDINGTON v. PALEOLOGO.

do not attach consequence to this argument. I confine myself to the construction of the writing. It was alleged to be a case of mean repudiation, prices having fallen; it may be so, but I think it better that a shabby defence should prevail, than a loose construction be put upon a written mercantile contract, the inevitable consequence of which is uncertainty, litigation, and expense.

PIGOTT B. The parties to this suit had entered into a contract, partly written and partly printed, on March 21st, for the sale and purchase of 900 pieces of cloth; and the stipulation for the delivery was this: "Delivering on April 17; complete 8 May." No goods were delivered on the 17th, and on the following day, the 18th, the defendants, without making any demand, wrote to rescind the contract. The plaintiffs tendered a number of pieces on the 23rd, and on other days, and the residue on the 3rd of May; all which were refused by the defendants. The plaintiffs contended, first, that the agreement as to delivery was not a condition precedent; and secondly, that the meaning was that they should have the whole period for delivering, from the 17th to the 8th inclusive. The defendants' contention was: first, that the time for delivering was an essential part of the contract, for a breach of which they were entitled to cancel it; and in this it is enough to say that I hold that they were right. But secondly, they contended that the omission to deliver a substantial part "on the 17th of April" constituted such breach, inasmuch as the expression "*on the 17th*" must be taken to shew that a part delivery was contracted to be made *on* that day.

Between these conflicting views we have to decide, and to say what is the true meaning to be attached to the language of the contracting parties as understood by both of them. There is a canon for construing a contract laid down by Parke, B., which I think applicable to the present case. He says: "It ought to receive that construction which its language will admit and which will best effectuate the intention of the parties to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent." (1)

(1) *Ford* v. *Beech*, 11 Q. B. at p. 866.

Now, in the present case, the parties have, for the sake of brevity, expressed their meaning imperfectly and ungrammatically, and have clearly left part of it to be implied (whatever construction we may adopt), unless we were so to construe it as to confine the delivery to the two named days, excluding the intermediate period altogether, which is the literal construction. But neither party has contended for this view, and it is evident, upon the whole, that it was not their intention. Then there are the two alternatives presented to us by the parties, and I adopt that of the plaintiffs as the true one. I see no probability in the suggestion that importance was attached to an indefinite part delivery on the 17th, any more than to that to complete the delivery being confined to the last of the days named. Had such been the intention I should have expected that some quantity would have been specified as the first instalment; as either, that it should be a sample only, or a substantial quantity; but on this the contract is wholly silent. The defendant, however, relies on the words "*on* the 17th;" and if it had stopped there the matter would have been plain enough, and the whole delivery would necessarily have been on the day named. But the words which follow must be read, and then we find that a period of time consisting of several days is added to the first day, for the purpose of delivering the goods, but without saying what quantity is to be delivered on the first or on any other day, or if any part need be delivered on any given day after the first; thus leaving it to be inferred, as I think, that the vendor might select which part he shall deliver at any period, so as he shall perform his contract, completing the whole delivery by the later day, inclusive. The object of the parties seems to me to have been to fix a period for the completion of the contract, and this they have done by naming the first and last days of that period; so that the buyer could not demand, nor be bound to receive, any part before the 17th of April; and the seller was bound to deliver all between the fixed days. It was said that this construction gives no effect to the first day named, and that it would have been sufficient for the accomplishment of this object to name one day by which it was to be completed. But I can understand that the buyer may have no convenience for warehousing, or may have wished to avoid the labour and expense of removing,

1867

CODDINGTON v. PALEOLOGO.

and with some such view may have desired to have the goods not earlier than the 17th of April, and not later than the 8th of May; and this is what in substance I think he has contracted for. The term of credit throws no light on the matter, as we are told that it is unaffected by either construction. For these reasons I think the plaintiffs are entitled to the verdict, and that the rule should be discharged.

KELLY, C.B. This was an action for not accepting goods, and the question is whether, according to the terms of the contract, the plaintiffs were bound to deliver some portion of the goods on the 17th of April, 1866.

The contract, as proved, consisted of a note upon a printed form, filled up in writing, headed: "To Messrs. Coddington and Sons. Copy of order contracted with you this day." And after other stipulations the paper was as follows: "Delivering on April 17th; complete 8th of May." The word "delivering" is in print, the rest in writing.

It is upon the words, "Delivering April 17th; complete 8th of May," that the question turns.

The rule of construction applicable in general to all written contracts is, that they are to be construed according to the real intention of the parties, to be collected from the language they have used; that effect is to be given, if possible, to every word used, and that every word is to be interpreted according to its natural and ordinary meaning, unless such construction would be contrary to the manifest intention of the parties, or would necessarily lead to some contradiction or absurdity. But this rule, though applicable to contracts in general, must be received with some qualification, when the contract or a portion of the contract in question consists of an incomplete sentence, ambiguous in its terms, and upon which a literal construction of every word would either be impracticable, or would leave the contract indeterminate and uncertain. And such is the case with the contract in question, which I think is to be construed according to what we can collect to have been the substantial intention of the parties, applying our common sense, and such knowledge as we may possess, to the language in which they have expressed themselves.

Upon this principle, I think that the real meaning of the provision in question was, that the period for the delivery of the 900 pieces of goods was to begin on the 17th of April, and end on the 8th of May, both days being inclusive; that this period was agreed upon as convenient to both parties, for the delivery by the vendor, and the receipt or acceptance by the vendee; that the contract is satisfied by the delivery of the whole quantity between the 17th of April and the 8th of May inclusive, in such portions and at such intervals as a jury might think reasonable with reference to the nature and effect of the whole contract. It follows, therefore, that it was not necessary to begin the delivery on the 17th of April, any more than to finish it on the 8th of May.

It was suggested in argument that the defendants might have required a part delivery on the 17th of April, in order that they might immediately send samples to their correspondents; and no doubt this reason, or other reasons, might have existed for requiring a specific delivery on that day. But, if such had been the case, it is probable that the parties would have so expressed themselves in terms not to be misunderstood, and would not have contented themselves with the mere following up of the usual printed form—which seems to provide generally for the period of delivery—without a specific stipulation that there should be a part delivery on the first and on the last of the days in such period.

I am of opinion, therefore, that the plaintiffs were entitled to the verdict, and that the rule should be discharged.

The Court being equally divided, the rule dropped.

Attorneys for plaintiffs: *N., C., & C. Milne, for Bateson Wood, Manchester.*

Attorneys for defendants: *Reed, Phelps, & Sedgwick, for Sale & Co., Manchester.*

1867
Feb. 12.

LORD LECONFIELD *v.* DIXON AND OTHERS.

Inclosure Acts—Game—Reservation of Exclusive Right of Shooting—Construction.

By a private inclosure act an allotment was directed of certain waste lands; by s. 24 the mines, &c., under the allotments were not to be taken into the valuation of the allotments, they being reserved to the lord; by s. 32, subject to the reservations in the act, the allotments were to be the freeholds of the allottees; by s. 34 it was provided that the lord should have, &c., "all rents, &c., piscaries, fishing, hunting, hawking, and fowling, and all beasts and birds considered as game, &c., and all other royalties, liberties, privileges, franchises, pre-eminences, jurisdictions, and appurtenances," in as ample a manner as they are now, or have been heretofore used, exercised, and enjoyed by him, or as he "might or could have held, used, &c., the same" in case the act had not been passed; that section contained no reference to mines, but s. 35 reserved them to the lord, with certain powers of search and working. Before the act there was no right of free warren in the lord:—

Held, that the act did not confer on or reserve to the lord an exclusive right of sporting over the allotments.

Ewart v. *Graham* (7 H. L. C. 331) distinguished.

ACTION for disturbing the plaintiff's exclusive right of sporting over certain land. The defendants denied the right.

There was also a count for disturbing the plaintiff's free warren, but it was admitted at the trial that there was never any free warren in the land, and that count was abandoned.

The plaintiff was devisee for life of the manor of Croglin, under the will of the Earl of Egremont, who was lord of the manor at the date of the inclosure act referred to below; the defendant Dixon was the present owner of an allotment made under that act.

The Great Croglin Inclosure Act (48 Geo. 3, c. 47, of the private acts) was passed in the year 1808, and applied to Croglin manor and to other manors in the parish of Great Croglin.

By s. 20 (p. 14 of the private act) the commissioners were directed to allot to the earl and his heirs a certain proportion of the waste lands of Croglin manor, "as a full compensation for the right and interest of the said Earl of Egremont, as lord of the said manor, in and to the residue of the said open commons and waste grounds, and his right over the same (save and except as hereinafter excepted, and hereby reserved to him or them)."

Section 21 (p. 15) provided for an allotment to the rector for tithes, and s. 22 (p. 17) for the allotment of the residue of the waste lands to the earl, the rector, and the persons entitled to rights of common, &c., over the waste.

By s. 24 (p. 18) it was provided that, "the mines, minerals, and metals, and all stones and fossils lying under any of the allotments of the said open commons and waste grounds, to be made in pursuance of the act, shall not be taken into the valuation of such allotments, it being intended that all mines, &c., within or under the whole of the said open common and waste grounds" (with the exception of certain quarries and of loose stones) "shall be, and hereby are, expressly reserved to the lords of the said manors respectively for the time being;" and by s. 32 (p. 24) that the allotments should be estates of freehold in the allottees, "but subject and without prejudice to the right of the said lords of the said manors respectively for the time being, to the mines, minerals, stones, fossils, royalties, liberties, privileges, powers, and authorities, or any of them hereby reserved to him and them."

Section 34 (p. 25) provided that "nothing in this act contained shall be construed or adjudged to defeat, lessen, or prejudice the right, title, or interest of the said lords of the said manors respectively for the time being, of, in, or to the seignories or royalties, franchises and liberties, incident and belonging to the said several manors; but the said lords of the said several manors for the time being shall at all times for ever hereafter have, hold, take, and enjoy all rents, fines, suits, and services to or at the lord's courts, perquisites, and profits of courts, and suits and services to the lord's mill, *piscaries, fishing, hunting, hawking, fowling, and all beasts and birds considered as game,* goods, and chattels of felons and fugitives, felons of themselves and put in exigent, deodands, waifs, estrays, forfeitures, escheats, and all other royalties, liberties, privileges, franchises, pre-eminences, jurisdictions, and appurtenances whatsoever (except such as are expressly taken away by this act), in the same and as full, ample, and beneficial manner, to all intents and purposes, as they are now held, taken, and enjoyed, or have been anciently or heretofore used, exercised, and enjoyed by the present or any former lord or lords of the said manors respectively, or as he, she, or they, or any of them, might

1867

LECONFIELD v. DIXON.

or could have held, used, exercised, received, taken, or enjoyed the same, in case this act or the said recited act (41 Geo. 3, c. 109) had not been made."

Section 35 (p. 25) reserved to the lords of the manors all the mines, quarries, &c., within or under the lands to be allotted, with powers for searching for and working the same; and s. 37 (p. 26) gave to the owners of allotments certain limited rights of getting freestone, &c., on their allotments.

The cause was tried before Lush, J., at the Cumberland summer assizes, 1866, and a verdict was entered for the plaintiff, leave being reserved to the defendants to move to enter a verdict for them, on the ground that the right claimed by the plaintiff was not reserved to him by the Croglin Inclosure Act. A rule having been obtained accordingly,

Nov. 15. *Manisty*, *Q.C.*, and *Kemplay*, shewed cause. They relied upon *Ewart* v. *Graham* (1), which overruled or qualified *Greathead* v. *Morley* (2); and they distinguished *Bruce* v. *Hellilwell* (3), on the ground that it was there found as a fact that, "as owner of the soil," the lord had at and before the passing of the act the free and exclusive right and liberty of killing game. This was held by the Court to shew that the right was included in the rights of ownership of the land which were taken away and for which compensation was given, and that the right reserved must therefore be restricted to seignorial rights. They also referred to *Robinson* v. *Wray* (4), and contended that if the right reserved were seignorial only, the clause would be useless, inasmuch as there was no free warren here.

Temple, *Q.C.*, and *Jones*, *Q.C.*, in support of the rule, contended that the case was not governed by *Ewart* v. *Graham* (1), since the decision in that case proceeded on the ground that the reservation of mines was made in the same section that reserved the right of sporting; the latter right was therefore taken to be ejusdem generis with the mines, that is a territorial, and not a seignorial, right. Here, however, the mines were reserved by a different section; the other rights included in the section were clearly

(1) 7 H. L. C. 331; 5 Jur. N. S. 773; 29 L. J. (Ex.) 297.
(2) 3 Man. & G. 139.
(3) 5 H. & N. 609; see p. 618,
(4) Law Rep. 1 C. P. 490.

seignorial, and the right of sporting must be of the same order. With respect to the argument that if the right of sporting reserved were only seignorial, the reservation would be idle, inasmuch as no free warren existed, the same was certainly true of many of the rights reserved, and the whole clause must be read as put in ex majori cautelâ, and with the addition of the words "if any." They relied on *Bruce* v. *Helliwell* (1) and *Greathead* v. *Morley* (2), contending that the latter case was not overruled by *Ewart* v. *Graham.* (3)

Cur. adv. vult.

Feb. 12. CHANNELL, B., read the judgment of the Court (Kelly, C.B., Bramwell, Channell, and Pigott, BB.) prepared by

BRAMWELL, B. We are of opinion that this rule should be made absolute. In considering the statute on which the question turns, it is not to be treated as one which is for the benefit of the commoners only, nor as one which takes from the lord only. It is, as is recited, and as we know, as much for the benefit of the lord as of the commoners; it takes indeed from him, so it does from them, and it gives to both. But it should be remembered that the right now claimed by the plaintiff is inconsistent with the useful design of the statute; which was that the lands affected should be held in severalty, with a plenary proprietorship, unfettered by the rights of others over them. There is no doubt that this is most for the public interest. If the plaintiff's claim is well founded, there is no use to which the defendant can put his lands without their being subject to that claim. He could not build a house and have a garden or lawn without the privacy of the occupier being liable to invasion by the plaintiff in search of game. No doubt, if those under whom the plaintiff claims bargained for this at the time of the inclosure, he would get less land allotted to him, and the commoners more, on account of the diminished value of their allotments owing to this burthen, and consequently in law and justice the plaintiff ought to have what he claims. But, on the other hand, if there was no such bargain, and if, in considering what the commoners were to have, it was assumed that their

(1) 5 H. & N. 609; 29 L. J. (Ex.) 297.
(2) 3 Man. & G. 139.
(3) 7 H. L. C. 331.

1867

LECONFIELD v. DIXON.

allotments would not be subject to this burthen, and less was allotted to them, and more to the lord, in consequence, then the plaintiff is asking for what in law and justice he ought not to have. There seems good reason for supposing that this is so, if, as the defendant says, this supposed right has never been claimed for fifty years. And the statute itself countenances the notion, for by the section at the bottom of p. 18 (s. 24) it is enacted, that mines and stones under the allotment shall not be taken into the valuation of such allotment; but there is no clause that the allotments should be valued as if burthened with the right of sporting. Still, right or wrong, if the statute gives it to the plaintiff he must have it.

Now, if it does, it is by the section at p. 25 (s. 34), for without that it is clear the soil would be taken from the lord and vested in the commoner, with all the incidents of proprietorship. Then, has that section such an operation? If I had my own judgment alone to trust to, I should say clearly not. The burthen of proof, or the burthen of exposition, is on the plaintiff. It is for him to shew that the clause gives the right, not for the defendant to shew that it does not. The defendant might content himself with saying, as we do, that no argument has been used to shew that the clause has such an effect. But we go further, and think we can shew negatively that it has not. It is emphatically a saving clause; put in to prevent questions being raised, such as whether by the operation of such and such an enactment such and such a right is taken away. It begins by saying: "nothing shall defeat, &c., lessen or prejudice the rights, &c., of the lord to the royalties, &c., incident, &c., to the manors." This would not give the right contended for. But the clause proceeds, "but, &c.," and no doubt what follows that word may be more extensive than what precedes, though presumably it says now affirmatively what before it said negatively, namely, "he shall enjoy what shall not be defeated." The clause says, "but the lords shall have, &c., the things enumerated, and all other royalties, &c., in the same manner as they are now or have been enjoyed by the lords of the manors, or might be if the act had not passed." Now, if there had been no particular things named, but only the general words "all royalties, liberties, privileges, &c.," it is clear the clause would not give this right of

sporting, as it is clear it would reserve only rights belonging to the lords of the manor as such. What difference, then, does it make that the particular words are introduced, "piscaries, fishing, hunting, hawking, and fowling, and all beasts and birds considered as game"? We say, none. They are in the middle of a clause which says negatively, the rights of the lord shall not be lessened, and proceeds to say affirmatively, "but certain rights and other rights of the lord shall be enjoyed." Both the beginning and end of the clause clearly deal with the rights of the lord as such, and so we say does the middle. The argument for the plaintiff is, what effect have these words unless that which is contended for? This is a good argument where applicable, but it is not applicable here. For this reason: the same question might be put as to all the other words. Can it be contended that the clause makes any rent fines, &c., payable, which otherwise would not be so? or that the lord will have by virtue of it any felon's chattels and deodands which he would not otherwise have? Further, the clause itself speaks with uncertainty, for it says, "have been," or "might or could have been," held or enjoyed. The same operation should be given to each and all the words, and no greater to one set than to another. Further, the words are erroneous, if used to confer such a right as the plaintiff claims. The lords are to enjoy "piscaries, &c. and all beasts and birds considered as game, &c., and all other royalties, liberties, privileges, franchises, pre-eminences, jurisdictions, and appurtenances." The lord had no royalty, liberty, privilege, franchise, pre-eminence, jurisdiction, or appurtenance, of shooting game over this land; no more than he had of shooting rabbits, or planting trees, or cutting gorse, provided he did not interfere with the commoners' rights. His right was that of owner of the soil. This section supposes other rights. If by these words the right of shooting game is reserved to him, then by the words "other royalties, &c." he has the right of shooting rabbits, and doing other things he could do as owner of the soil, which is absurd. Moreover, where it is intended to give him a right which he possessed as owner of the soil, and would not have unless it was expressly given to him, as mines, it is not done in the section in question (s. 34), but is done in clear and proper language in the next section (s. 35), and provisions are made for his enjoyment of them. It is said that *Ewart* v.

1867

LECONFIELD v. DIXON.

Graham (1) is an authority for the plaintiff. By that authority we are bound, and, we repeat, convinced, by its arguments. But we think it no authority for the now plaintiff. Indeed, it seems to us against him, because of the reasoning that was there used. The present case wholly differs from *Ewart* v. *Graham.* (1) There is no mention of allotments in the clause now relied on, as in *Ewart* v. *Graham* (1), nor does the clause contain any reservation of mines, as in that case. We must say here that it is for the plaintiff to shew how it is an authority, and we have heard no argument to make us think it so. On the other hand, the case of *Greathead* v. *Morley* (2) so differs from this as not to govern it, though some of the reasons there used may be applicable here. We think the defendants entitled to judgment.

Rule absolute.

Attorneys for plaintiff: *Jennings, White, & Buckston, for S. & S. G. Saul, Carlisle.*

Attorneys for defendants: *Nicol & Son, for Cant & Fairer, Penrith.*

Feb. 12.

STAFFORDSHIRE BANKING COMPANY, LIMITED *v.* EMMOTT.

Debtor and Creditor—Deed under s. 192 *of Bankruptcy Act,* 1861 (24 *&* 25 *Vict. c.* 134)*—Deed containing Release not Pleaded—Estoppel—Effect of s.* 198 *in Preventing Process from being Available.*

3 QB 623. 8

4 Ex 333.

4 C.P. 610.

The defendant, having had the opportunity to plead to an action a deed under s. 192 of the Bankruptcy Act, 1861, omitted to do so, and judgment was recovered against him; a fi. fa. being afterwards levied on his goods, he sought to avail himself of the protection of s. 198, which enacts that, after notice of the registration of such a deed, process shall not be available.

Held, per Kelly, C.B., and Pigott, B., that he could do so; per Bramwell and Channell, BB., that he could not.

Whitmore v. *Wakerly* (3 H. & C. 538) and *Hartley* v. *Mare* (19 C. B. (N.S.) 85) considered. (3)

IN this action, under the Bills of Exchange Act, 1855, the defendant obtained leave to appear and plead; on the 24th of October, the declaration was delivered; on the 7th of November the defendant pleaded never indebted, and on the same day he and

(1) 7 H. L. C. 331. 5 Jur. N.S. 773 (2) 3 Man. & G. 139.
(3) See *Braun* v. *Weller*, Law Rep. 2 Ex. 183.

1867

STAFFORDSHIRE BANKING CO., LIMITED v. EMMOTT.

his partner executed, and on the 8th of November registered, a deed under s. 192 of the Bankruptcy Act, 1861.

The deed was made between the debtors of the one part, and all their creditors, joint or separate, of the other part, and, in consideration of a composition of 1s. in the pound secured by the deed, the creditors absolutely released the debtors from their debts, both joint and separate. The deed was assented to by the statutory number of creditors. Notice of the deed was sent by post to the plaintiffs on the 7th of November, and the deed was gazetted on the 9th.

On the 8th of November issue was joined; on the 13th the cause was tried as undefended, and the plaintiffs obtained a verdict; they afterwards signed judgment, and issued execution. On the 16th the sheriff seized the defendant's goods under a fi. fa.

The defendant took out a summons at chambers to set aside the execution, and on the 20th of November, Martin, B., dismissed the summons, with leave to the defendant to apply to the court, the defendant to mould the rule as he might be advised.

A rule having been obtained accordingly (1),

Nov. 25. *H. James* shewed cause. The point raised on this motion has been already decided in *Whitmore* v. *Wakerly* (2), where this Court decided that a debtor who could have pleaded the release in the deed to the action cannot afterwards take advantage of the deed under s. 198. *Hartley* v. *Mare* (3) has been supposed to be in conflict with that case, but it is not so in fact; the application in *Hartley* v. *Mare* (3) was by the inspectors under the deed, who had never had an opportunity of pleading it, and who were not therefore affected by the rule that a release must be taken advantage of on the earliest opportunity. (4) A practical injustice

(1) The rule was moved in the same form as the summons—that is, to set aside execution—but on the argument it was, by the permission of the Court, altered to the form of a rule directing the sheriff to withdraw.

(2) 3 H. & C. 538; 34 L. J. (Ex.) 83.

(3) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187.

(4) It was also assumed in *Hartley* v. *Mare* that the application was different from that in *Whitmore* v. *Wakerly*, and was not, therefore, governed by that case (see per Erle, C.J., 19 C. B. (N.S.), at p. 93; 34 L. J. (C.P.) at p.

1867

STAFFORDSHIRE BANKING CO., LIMITED v. EMMOTT.

would be caused by allowing the debtor to pursue this course, for if he had pleaded the deed he would have entitled the plaintiff to costs up to the date of the plea. It amounts to little less than a fraud on the plaintiff to allow him to incur the additional expense of going on to judgment.

Anstie, in support of the rule. The cases of *Whitmore* v. *Wakerly* (1) and *Hartley* v. *Mare* (2), though capable of distinction, are substantially at variance, and the latter case supports the application in the form in which it is now made. Of the two cases, *Hartley* v. *Mare* (2) is the later, and appears to have been the most fully argued; and, on the other hand, *Whitmore* v. *Wakerly* (1) was decided before the case of *Clarke* v. *Williams* (3) in the Exchequer Chamber had settled that a deed under the Bankruptcy Act, 1861, not containing a release or an equivalent provision, cannot be pleaded in bar. The decisions in *Clarke* v. *Williams* (3) and *Hartley* v. *Mare* (2), taken together, shew what is the true view of the design of the act. The statute, providing for a public notice of the registration of the deed, enacts that on the fulfilment of that condition, no process shall be available against the debtor or his goods. The creditor may be entitled, as was said by Erle, C.J., in *Hartley* v. *Mare* (2), to go on to judgment, but he proceeds at his peril; he cannot make process available, and of this the 198th section, and the advertisement in the *Gazette* gives him notice. The effect, then, of the deed in preventing process from being available is derived solely from s. 198, and from the due execution and registration of a valid deed under the act, with notice; it is not the result of the deed containing a release, but follows, whatever may be its form or contents, so long as it is a valid deed. This is the mode provided by the statute for effectuating deeds made in pursuance of it, and the provision is to be carried out by motion, and not by pleading, which was evidently not in the

188); but, on examining the Master's books, it was ascertained that the application in *Whitmore* v. *Wakerly* was that "the sheriff withdraw from possession," and not "that the execution be set aside." The reports in 3 H. & C. 538, and 34 L. J. (Ex.) 83, differ on this point; and in deciding the case of *Hartley* v. *Mare*, the Court of Common Pleas had only the latter report before them.

(1) 3 H. & C. 538; 34 L. J. (Ex.) 83.

(2) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187, 11 Jur. N.S. 625.

(3) 3 H. & C. 1001; 34 L. J. (Ex.) 189.

contemplation of those who drew the act. But where, on the other hand, a deed under the act can be pleaded at all, it is so pleaded by virtue of its being a release at common law; the only part which the statute contributes to that defence is, that after the execution of the deed by the statutory number, the non-assenting creditor is bound as if he had executed, and it is only to this extent that it is pleaded as a deed under the act. The defendant, therefore, is not now availing himself of the same defence that he would have availed himself of in pleading the release, and it would be as unreasonable to refuse this application as if the release had been contained in a separate deed. The application, therefore, of the rule relied upon by the plaintiffs fails.

But, further, to refuse the relief asked for is contrary both to the words of the section and to the intention of the act. The words are imperative and unqualified, and neither make any distinction between deeds which contain a release and those which do not, nor say anything about the persons making the application. It is not to be assumed that the debtor is the only person benefited by the act, the provisions of which are intended for the benefit of the creditors, and are so described; and—whoever makes the application—it is, in fact, made not in the interest of the debtor alone, but of his creditors. They have assented on the assumption that the deed they have executed will be really carried into effect, and the benefit they stipulate for usually depends on its fulfilment. The creditor, therefore, who is bound by the deed, and whom the statute places in the same position as if he had executed it, is acting in fraud of the rest of the creditors in seeking to obtain an additional advantage. But the act points out his true remedy. If there is in fact any good reason why he should be allowed to proceed, he may apply to the Court of Bankruptcy for leave, and in considering that application the Court will be able to examine whether there are any circumstances that entitle him to exception from the general prohibition, or whether the other creditors will be prejudiced by his proceeding. If he declines to make use of that liberty, and proceeds on his own responsibility, he cannot justly complain of being restrained in a course which he adopted at his own risk after due notice, nor of costs which he has wilfully incurred.

1867

February 12 The following judgments were delivered:

STAFFORDSHIRE BANKING CO., LIMITED v. EMMOTT.

KELLY, C.B. The plaintiffs having issued execution upon a regular judgment obtained in this action, the question is, whether the defendant is entitled to a rule upon the sheriff to withdraw from possession, on the ground that he had caused to be duly registered a deed of composition valid within the 192nd section of the Bankruptcy Act, 1861, but which, inasmuch as it contains a release, might have been but was not pleaded in bar to the action.

This question is of the highest importance, for it arises almost from day to day in one or another of the superior courts, or before a judge at chambers. Two of the superior courts are at variance upon the point; this Court having decided in *Whitmore* v. *Wakerly* (1), that where the debtor has omitted to plead the deed as a defence to the action, when it might have been so pleaded, the statute becomes inoperative, and the Court will not relieve the defendant from the execution; and the Court of Common Pleas in *Hartley* v. *Mare* (2), having held that the execution could not be made available without leave of the Court, notwithstanding the defendant had failed to plead the deed by way of defence, when it might have been pleaded.

Under these circumstances we are called upon to determine this question, which directly arises in the present case; and I am of opinion that the statute is positive and imperative, and that the Court is bound to relieve the defendant or his effects against this execution, whether he shall have had the opportunity, or, having had it shall have availed himself of it or not, to plead the deed by way of defence to this action.

The general intention of the legislature (in introducing this entirely new provision into the law) appears to have been to enable a debtor, with the assent of a specific majority of his creditors, to bind the entire body by a deed of composition or inspectorship, or in trust for creditors, and to carry the provisions of the deed into effect for the benefit alike of himself and of his creditors, by protecting his person and his property against all debts and liabilities whatsoever incurred before the execution and registration of the deed. To effect this purpose, the 192nd section

(1) 3 H. & C. 538; 34 L. J. (Ex.) 83.
(2) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187.

1867

STAFFORDSHIRE BANKING CO., LIMITED v. EMMOTT.

points out the several descriptions of deeds that may be entered into, and the conditions upon which they are to become valid and binding upon the whole body of the creditors, while the 197th and 198th sections confer jurisdiction upon the Court of Bankruptcy over all parties to the deeds, and all who are bound by them, and extend an ample protection to the person and property of the debtor, whilst the deed is in operation and fulfilling its destined purpose. The language of the 198th section is positive, clear, and absolute, save that the protection granted is made subject to one condition or qualification. It is expressly enacted and ordained by the legislature that no execution shall be available against the person or property of the debtor unless by leave of the Court, which has been held to mean the Court of Bankruptcy; and the construction put upon this clause in many unquestioned decisions has been, that the Court or a judge is bound upon motion or summons to relieve the debtor against all executions if the deed be valid and duly registered. Upon what ground, then, can we be called upon to introduce a condition or restriction, which the legislature has not thought fit to impose, upon the exercise of the authority or the discharge of the duty of the Court? and that by reason only of a rule of law, or rather a rule of practice, which has prevailed reasonably and justly with regard to the course of procedure in a suit at law, but which would defeat the undoubted intentions of the legislature if applied to this special prohibition to take a debtor or his property in execution, and can have no application at all to a great variety of cases which arise under this act of parliament. If the legislature had intended that these deeds should be pleaded by way of defence to actions by creditors, it is presumable that a summary and concise form of plea would have been given, by which the debtor might at once have stopped all actions, as he may now relieve himself upon motion from all executions. It is manifest that the legislature had no intention to interfere with any action by a creditor against a debtor, until the creditor should attempt to issue execution against the person or the property of the debtor. The deeds contemplated by the statute are of many kinds. Some of them may contain a release, which, not by force of the statute but at common law, would be a defence to an action. Other deeds, though they may provide for the

1867

STAFFORDSHIRE BANKING CO., LIMITED v. EMMOTT.

forbearance by the creditor to interfere with the carrying on of his trade, or the continuance in possession of his effects on the part of the debtor, nevertheless contain no express stipulation which would be pleadable in bar of an action. Other deeds, again, though they may contain a release, make it to operate only upon payment of the instalments of a composition; and there are many which, though containing an immediate release, make it void upon the failure by the debtor or his surety to pay the full amount of the composition agreed upon, or upon some other contingency which may or may not arise. Yet in all these cases, without distinction, the legislature has expressly enacted that no execution shall be available against the person or the property of the debtor. How, then, can it be contended that the statute has any regard to the pleadings or other proceedings in an action, when we find it thus provided that, whether the deed shall be such as to furnish a defence to an action or not, the creditor is in all cases forbidden to avail himself of any execution?

The well known doctrine touching an audita querela, or the rule of practice under which relief may be obtained upon motion where the writ would lie, treated of in Wms. Saunders, vol. ii. p. 148, in the note to *Turner* v. *Davies*, has really no application whatever to this question. The writ will not lie, and relief upon motion will not be granted to prevent execution, where the matter relied on might have been pleaded as a defence to the action; but here, it is the release which might have been pleaded, and it is not the release, but a valid deed not merely executed but registered within the statute, and which may not, and in many cases does not, contain any release at all, or any other matter of defence pleadable, upon which relief is sought against an execution. What possible injustice can a creditor sustain by a decision that his debtor is in no case bound to plead a deed of this nature as a defence to an action? Supposing the deed valid and a defence, if pleaded it will prevent both judgment and execution; if not pleaded, the plaintiff will obtain his judgment, but cannot proceed to execution. If the deed be invalid and no defence, whether pleaded or not, the plaintiff will be entitled both to judgment and execution. It is suggested that if such a deed be pleaded as a defence arising after action brought, the plaintiff may admit the plea and take

judgment for his costs to the time of pleading. If the law be that under such circumstances he could issue execution for his costs, the law would work great injustice to an insolvent debtor, and pro tanto defeat the intention of the statute, which was to protect his person and his property against execution by reason of any debt or liability antecedent to the registration of the deed. The costs of an action, and still more probably of several actions, might be of so large an amount as, if enforced against the debtor's property, materially to interfere with, perhaps altogether to defeat, the arrangement provided by the deed; and thus a creditor, or a small number of creditors, though bound by the terms of that arrangement, would have it in their power to nullify it altogether, and contrary to the spirit at least of the contract into which they will have entered, or by which they will have become bound, to sweep away the whole effects of the debtor, to the prejudice, not only of the debtor, but of all the rest of the creditors. But I am of opinion that the law is otherwise, and that whether the deed be pleaded or not, a plaintiff's costs to the time of registration, accruing in any action already brought, constitute a liability within the 192nd section, and are proveable together with the debt itself under the deed.

Again, an honest debtor has no motive, and may not desire to plead a deed, or to incur the smallest costs in any action by a creditor, so long as he is secure against executions, and so enabled to wind up his affairs in the manner agreed upon by his creditors. Then a creditor, although precluded from issuing execution, may yet reasonably desire to have a judgment, even where there is a release in the deed, in order that he may be able, if the deed should prove abortive, as by nonpayment of the composition, or failure to carry on the business under inspection, or even the absconding of the debtor, to enforce his debt at once; or if, as would probably be the case, the estate of the debtor should come to be administered in the Court of Bankruptcy, to place himself in the most advantageous position among the other creditors. But if with any other view, why should he be permitted, much less forced on by the debtor himself, to proceed? Upon notice of the registration of the deed he knows he cannot proceed to execution. If then, unless for some such purpose as before pointed out, he pro-

1867

STAFFORDSHIRE BANKING CO., LIMITED v. EMMOTT.

ceeds at all, he acts at his peril, and ought not to be entitled to any costs which he may have incurred, or to any benefit which he could possibly derive from his judgment. It is indeed difficult to imagine a case in which, if full effect be given to the statute upon a literal as well as substantial construction of its language, any prejudice can arise to any single creditor from the omission of the debtor to plead a deed of composition. If a creditor thinks fit to proceed to judgment, and by reason of any contingencies rendering the deed abortive, as above pointed out, justice should require that the protection extended to the debtor and his property should cease, it is always open to him to apply to the Court of Bankruptcy, which, as before observed, has jurisdiction alike over debtors and creditors, and all other parties to such a deed, for leave to issue execution. The statute gives effect to these deeds, and protects the person and property of the debtor, not for the sake of the debtor alone, but for the benefit of the whole body of creditors under the arrangement which the great majority of them have sanctioned, and of which they will be deprived unless the statute be strictly observed, and the effects of the debtor protected against executions. Why, then, should the creditors be deprived of this benefit by the negligence, if negligence it be, of the debtor, to which they are no parties, and which they have no power to prevent? Nor must it be forgotten that the sheriff who puts an execution in force, whether against the person or the property of the debtor, is bound, upon the production of the certificate of registration, which operates as a protection in bankruptcy, to release the debtor or withdraw from the possession of his property. How is he to inform himself whether the defendant might have pleaded the deed as a defence to the action, and has failed to do so?

Upon the ground, then, that the language of the statute is imperative and clear, and that the legislature has made no distinction between cases in which a deed may or may not be pleaded, or has or has not been pleaded, by way of defence to the action, I am of opinion that the Court is bound to extend to the defendant the protection which the legislature has conferred upon him, and that the rule that the sheriff do withdraw from possession should be made absolute.

1867

STAFFORDSHIRE BANKING CO LIMITED v. EMMOTT.

BRAMWELL, B. I am of opinion that the plaintiffs are entitled to judgment. It is established beyond question that a deed such as this may be pleaded in bar of the maintenance or further maintenance of an action such as this; and that if this deed had been perfected before this action, the action might have been barred by pleading it. It is said that a defendant has in addition the right to let the action proceed to judgment, and then set up the deed in bar of the execution. It must be admitted that this would be an anomaly; the rule being that defences must be pleaded at the time for pleading, or as soon after as they arise, or the benefit of them will be lost. And it must be admitted that, not only would an anomaly be created, but great inconvenience and injustice; for a plaintiff would be put to all the expense of an action prolonged to judgment, needlessly and fruitlessly. It is said that the plaintiff should not sue nor proceed with his action, knowing of such a deed. To this there are many answers. The plaintiff may not know of it. He may desire to contest its validity. His own debt may be disputed. He is entitled, if the deed is pleaded in bar of the further maintenance of the action, to confess it, and get his costs up to that time; but this he cannot do unless it is pleaded. If the defendant is right in his present contention, he will have to pay no costs; but if he had pleaded, as he might, he would have had to do so. So that the more costs he puts the plaintiffs to, the less he pays himself. If it is said the plaintiff's remedy is to apply to the Court, he could not then get his costs. Besides which, he is entitled to try the validity of the deed by the ordinary tribunals for the trial of a cause of action and an alleged defence. And I doubt if "the Court" can be applied to when the deed is invalid. (1) But it is said that the words of s. 198 are express. It seems to me that, however plain, they must be so construed as not to give rise to the mischiefs I have pointed out. But in fact they must be qualified for another reason. If the clause "after notice of filing such deed has been given as aforesaid, no execution, &c., in respect of any debt, &c., shall be available," were applied according to its very words, it would follow that where there was a deed in 1865 and a debt in 1866 no execution could issue for it. Again, the

(1) See, however, *re Tresidder*, Law Rep. 1 Ch. Ap. 21, and the cases in Bankruptcy there cited.

1867

STAFFORDSHIRE BANKING CO., LIMITED v. EMMOTT.

execution may be on a judgment for a debt, or on a judgment for a tort. If before the deed, such judgments would be debts, and entitled to dividends; if after, they would not be debts so entitled; and yet, according to the very words of the section, no execution is to be available, and consequently the person entitled to the judgment would get neither dividend nor execution. The words therefore must be qualified at least thus: "No execution in respect of any debt that might be proved under the deed." But the judgment debt for debt and costs cannot be proved under the deed, for the judgment did not exist at the making of the deed; and it might be that the costs added to the debt would alter the proportions, and prevent there being three-fourths in value of assenting creditors. I say, then, that the words do not necessitate the mischief the defendant contends for. The clause is satisfied by holding it to mean that, where there is a judgment that can be proved, and afterwards a deed perfected, no execution shall issue, or having issued shall be proceeded with.

4 Ex 334

It is said there are some deeds which, though within the statute, furnish no defence to an action, and therefore this clause must be acted on in such cases after judgment, and consequently in all other cases. It is true there are such deeds, but the consequence does not follow. There can be no deed which not only does not protect the debtor's property by operating directly on it, but at the same time does not protect it and the debtor's person indirectly by furnishing a bar to an action. Such a deed would be nugatory. It would be a deed which in no way restrained the creditor, nor protected the debtor nor his property, and therefore would be inoperative and idle. But no doubt this might be a reasonable deed of assignment of the debtor's property without more, and it is said that as such a deed could not be pleaded, then, unless this clause applies after judgment, the person of the debtor and his after-acquired property would be liable. I ask, why not? It is to be remembered that these deeds are matters of agreement; and, if the debtor does not choose to ask for protection against this, or the creditors do not choose to grant it, why should the law do so? Let us suppose the possible case of an honest debtor unable to pay, wishing his creditors should divide his property equally, but not desiring to protect his person or future property. Can he not

1867

STAFFORD-SHIRE BANKING CO. LIMITED v. EMMOTT.

so arrange? It probably would be admitted he could do so, by stating in the deed that his person and after-acquired property were *not* to be protected. But why are he and his creditors to say there shall be *no* such protection? That is the law, unless they say that there shall be. The affirmative statement is necessary, not the negative. And this suggests another argument. The rights of debtor and creditor are matters of agreement. Why is this defence, depending on agreement, to be treated differently from any other depending on the same? Further, why is the debtor differently situated to a man who has his discharge in bankruptcy? The true way to consider these deeds is to consider them as valid against assenting creditors at common law, and, by force of the statutes against dissenting creditors, to the same extent and no more. This appears by s. 192, which says that they "shall be as valid and effectual and binding on all the creditors as if they were parties to and had duly executed the same." That is all. These plaintiffs are not differently situated from a creditor party to the deed. Suppose that an assenting creditor had gone on with his action, alleging that his consent had been obtained by fraud, or for some other reason, must not the defence have been pleaded? If not, why? It would be a common law defence, not one by the statute. If the deed must be pleaded to an action by such a creditor, why not to an action by this creditor, as to whom the deed is only *as* valid, binding, and effectual, as if he had been a party to it? It is said that if the plaintiff had been taken on a ca. sa. he must have been at once discharged. I say "no." The words of the statute are unfortunate in likening the certificate, which is of permanent, to a protection which is of temporary, operation. But it is clear that, if a judgment were got on a debt which accrued after the deed, the certificate would not be a protection against a ca. sa. Nor would it in the present case. It is only a protection when the judgment is before the deed.

With respect to the authorities, there is one in point in this court, which has been repeatedly acted upon, at chambers at least (1), and, with great respect, I prefer it to *Hartley* v. *Mare*. (2) That case was rightly decided, if it was rightly taken that the money was

(1) *Whitmore* v. *Wakerly*, 3 H. & C. 538; 34 L. J. (Ex.) 83.

(2) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187.

1867

STAFFORDSHIRE BANKING CO., LIMITED v. EMMOTT.

the money of those to whom it was ordered to be paid, and was paid into court to prevent their goods being sold: see per Byles, J., 19 C. B. (N.S.) p. 94. But no doubt the reasons given would apply to the present case in favour of the defendant. But, I say it with greatest respect, the only argument used by the Chief Justice is, "the words are general, and we are bound to give effect to them according to their plain meaning." And the same remarks may be made on the judgments of the other learned judges. With submission, I think there is a great deal more for discussion in the question. My judgment is for the plaintiffs.

There is another point. If this execution is wrongful, let the defendant try it in the ordinary way. Let him bring an action against the sheriff or execution creditors. Why is the Court to interfere in this summary way, especially as there is a difference of opinion? The defendant's case is—you, the plaintiffs and the sheriff, have no right to seize or continue in possession of these goods. If so, an actionable trespass or tort is committed. When A. complains that his goods have been taken under a judgment against B., he brings his action; and the same remark is true of a false imprisonment. This is the same. I think the rule ought to be discharged on this ground, even if the defendant were otherwise right.

CHANNELL, B. In this case, the question for our decision is substantially the same as in *Whitmore* v. *Wakerly* (1), in this court. It is suggested that *Hartley* v. *Mare* (2) is inconsistent with that case. It seems to me, however, that the two cases are perfectly consistent, and both rightly decided.

In *Whitmore* v. *Wakerly* (1) we gave effect to the principle of law that a defendant cannot, in order to set aside an execution, avail himself of anything which would have been a defence to the action, and which he had the opportunity of pleading. The old authorities as to this are collected in the notes of Wms. Saunders, vol. ii. p. 148; and, on consulting the original authorities there cited—Sir Thomas Raymond (3) and Salkeld (4)—it clearly appears, as

(1) 3 H. & C. 538; 34 L. J. (Ex.) 83.
(2) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187.
(3) *Day* v. *Guildford*, Sir T. Raym. 19.
(4) *Wicket* v. *Creamer*, 1 Salk. 264.

1867

STAFFORD-SHIRE BANKING CO. LIMITED v. EMMOTT.

might, perhaps, have been assumed without any such research, that the principle alluded to is founded on the doctrine of estoppel. Where a man lies by, and allows his opponent to alter his position by incurring costs on the faith of his not possessing, or that he has abandoned, any defence but those of which he avails himself in the ordinary manner, he cannot afterwards set up a defence which he has thus induced his opponent to suppose either that he does not possess, or that he has abandoned. It is not, therefore, enough of itself to say that the words of this statute have conferred some immunity and protection on the debtor; it is necessary to see, also, whether, as between himself and his adversary, he may not have precluded himself from setting up that which he would otherwise have been entitled to do. In *Whitmore* v. *Wakerly* (1) we were asked to set aside a fi. fa., on the ground that the applicant had executed a deed. We refused, because we thought the applicant had, by his conduct, precluded himself from setting up that deed as against the judgment creditor. In *Hartley* v. *Mare* (2) money had been paid into court, and the Court of Common Pleas were applied to by inspectors under a deed to have it paid out to them. They said, this money really belongs to us on behalf of the creditors; we have had no opportunity of setting up our claim before, and have in no way precluded ourselves from setting it up now; as between ourselves and the judgment creditor, the money ought rather to belong to us than to him. The Court, as I think, very rightly granted the application. In the present case the application is made to us by the defendant in the original action, the person who had the opportunity of pleading the deed and did not do so; and I think that, as between himself and the plaintiffs in the action, he has precluded himself from setting up the deed, and from asking us to put in force in his favour the 198th section of the Bankruptcy Act. I quite agree that the legislature might have enacted that this doctrine of estoppel should not apply; but I see nothing to lead me to suppose that they have done so. Looking fairly at the whole scope of the sections relating to these deeds of arrangement, it seems to me that the object was to effect by private arrangement between

(1) 3 H. & C. 538; 34 L. J. (Ex.) 83.
(2) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187.

1867

STAFFORDSHIRE BANKING CO., LIMITED v. EMMOTT.

the creditors, and upon their own terms, the same thing as might have been effected by a bankruptcy. I can see nothing that shews any intention that a debtor should have more protection under one of these deeds than if he had obtained his discharge in bankruptcy. If he had done that, he would have to plead it in an action against him to which such a plea applied, or if he did not, he could not afterwards avail himself of it to avoid execution. I agree also that, if this doctrine of estoppel applies, the intention of the legislature that the assets shall be distributed as equally as possible amongst the creditors may be defeated. This, however, can only take place where there is no assignment of the debtor's effects; for wherever there is an assignment, of course the assignee may step in and say, "The goods seized are mine, and not the debtor's," and so defeat the execution though the assignment has not been pleaded.

It is clear that the present deed would have been pleadable in bar, and that the defendant had an opportunity—not a bare possibility, but a reasonable opportunity—of adopting the ordinary course of proceeding and pleading it, but did not do so. I think, therefore, that, as between the parties before us, the deed cannot be set up, and that the rule obtained should be discharged.

PIGOTT, B. This was an application to set aside an execution on the defendant's goods under s. 198 of the Bankruptcy Act, 1861, on the ground that he had executed a deed of composition under the 192nd section after action brought. The dates of the proceedings shew clearly that the defendant could have pleaded the deed to the action; and the only question is this, whether by the omission to do so, he is deprived of the benefit (under the 198th section) of staying this execution. The case of *Whitmore* v. *Wakerly* (1) in this court, and *Hartley* v. *Mare* (2), in the Court of Common Pleas, are really in conflict upon the subject, although the latter court, having before them only the report of the former case in the *Law Journal Reports*, thought otherwise. We are therefore called upon to review these decisions, and to determine which we will follow. The decision in this court rested

(1) 3 H. & C. 538; 34 L. J. (Ex.) 83.
(2) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187.

1867

STAFFORD-SHIRE BANKING CO., LIMITED v. EMMOTT.

on the well established principle of law, that where a defendant has an opportunity of pleading a defence to an action, he must do so, or lose the benefit of it. The decision in the case in the Common Pleas proceeded upon the very general and comprehensive language of the section of the act of parliament, which certainly in terms includes all executions in respect of "any debt," words which, beyond doubt, when read with reference to the 192nd section, mean any debt to which the deed applies. Now, it is true that the section does not notice expressly the rule of law above referred to; but if the full and ordinary meaning is to be given to its language, its necessary effect would be to abrogate that rule in cases to which these composition deeds apply; and in my opinion that must be taken to have been the intention. It may have been thought that all the creditors would have notice of the deed directly, or by means of the *Gazette*, and so would not proceed; or it may be that the legislature had no intention of dealing with actions or pleadings at all, but matters of bankruptcy and courts of bankruptcy only. But whatever may have been the view of the legislature, as to which it is needless to speculate, it certainly has employed language in the enactment which affects the rule by necessary implication. It is clear that there are cases in which a deed could not be pleaded at all, and where therefore the creditor would be entitled to go on to judgment and to issue execution; but, by reason of the 198th section, could not avail himself of the execution without leave of the Court. Such was the case of *Clarke* v. *Williams* (1); and the section in question makes no distinction between such cases and cases where the deed is pleadable; and we cannot, therefore, apply consistently a different construction to the same words, to suit various kinds of deeds. The intent of the act of parliament seems clearly to be, that where such a deed has been duly executed and registered, a certificate should operate in all respects as a discharge under a bankruptcy; nor will any injustice be done to the creditor as to the costs incurred before registration, for under the debtor's liability under the 192nd section they may be added to the debt, and any claim made under the deed. I think, also, that the former decision in this court would lead to much inconvenience in the execution of writs

(1) 3 H. & C. 1001; 34 L. J. (Ex.) 189.

1867

STAFFORDSHIRE BANKING CO., LIMITED v. EMMOTT.

by the sheriff. He can only see the certificate of registration, and must act upon it at the time of arrest, and when he has no opportunity of knowing whether the deed was pleaded or pleadable in the action. He might, in case of mistake, not be held liable, as in *Lloyd* v. *Harrison* (1); but it is hardly likely that the legislature meant to place him in the position of having to execute process without the means of knowing whether it be legal or illegal. There was no leave of the Court of Bankruptcy, in fact, for issuing this execution, and I am therefore of opinion that we ought not to limit the language of the legislature by a forced construction, but must decide, according to its plain terms, that the certificate operates as a protection in bankruptcy against this execution.

The Court being equally divided, the rule dropped.

Attorneys for plaintiffs: *W. H. Duignan, for Duignan & Lewis, Walsall.*

Attorneys for defendant: *Hare & Whitfield, for Heywood, Manchester.*

(1) Law Rep. 1 Q. B. 502, 12 Jur. N.S. 701

END OF HILARY TERM.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

EASTER TERM, XXX VICTORIA.

BLACKMORE *v.* YATES.

1867
April 17.

Railway Company—Assignment of Rolling Stock—Illegality—Lloyd's Bond.

A railway company gave a Lloyd's bond to their contractor, who handed it to the plaintiff to secure an advance of 10,000*l.* then made to him by the plaintiff. The plaintiff having, in the name of the obligee, brought an action against the company upon the bond, it was compromised before judgment on the terms that the company should transfer to him the whole of their rolling stock as security. The rolling stock was transferred accordingly, but was subsequently seized by the defendant, an execution creditor of the company. On the trial of an interpleader issue between the plaintiff and defendant:—

Held, first, that no evidence was admissible to impeach the original legality of the bond; and, secondly, that the conveyance of the rolling stock by the company to the plaintiff was valid as against the defendant.

THIS was an interpleader issue, directed to try whether the property in the rolling stock of the Wrexham, Mold, and Connah's Quay Railway Company, was in the plaintiff as against the defendant.

1867

BLACKMORE v. YATES.

The cause was tried by Mellor, J., at the last Liverpool spring assizes, when the following facts were proved:—

In the month of June, 1865, the company gave a "Lloyd's" bond to their contractor, Mr. Piercy, for 10,000*l.*, which he afterwards assigned to certain persons trading under the name of Broun, Shipley, and Co., for an advance of 10,000*l.*, made by them to him on the security of the bond. The plaintiff, who is an attorney, having, on behalf of the lenders, commenced an action in the contractor's name against the company, it was compromised before judgment upon the terms that the company should transfer to the plaintiff, as trustee for the lenders, the whole of their rolling stock, to secure the sum advanced. The defendant was an execution creditor of the company, and had seized their rolling stock subsequently to its transfer to the plaintiff. At the trial, it was proposed to shew that the Lloyd's bond was illegal, as having been given, not for work done by the contractor, but for money lent by him to the company. (1) The learned judge, however, refused to admit any evidence on this point, holding that the original validity of the bond could not be disputed in this action. He considered that the only question was whether the transfer of the whole of their rolling stock by the company to the plaintiff was or was not ultra vires and invalid. A verdict was, under these circumstances, entered for the plaintiff, with leave to move to enter it for the defendant, or a nonsuit.

Quain, Q.C., moved accordingly, or for a new trial, on the ground of the improper rejection of evidence. First, the evidence as to the original illegality of the bond should have been received. If it had been proved that the bond had been given for an illegal purpose, the compromise of an action founded upon it would have been founded on no good consideration. Secondly, the company had no power to assign all their rolling stock to the plaintiff. They are carriers, and as such have certain privileges conferred on them by act of parliament, and it is only on the condition that they maintain themselves in a position to work their lines that they can lay claim to those privileges: *South Yorkshire Railway and River Dun Company* v. *Great Northern Railway Company*. (2)

(1) See *Chambers* v. *The Manchester and Milford Railway Company*; 33 L. J. (Q.B.) 268, 10 Jur. N.S. 700 (2) 9 Ex. 55.

1867

BLACKMORE v. YATES.

KELLY, C.B. Without giving any opinion on the absolute right of a railway, under all circumstances, to convey away the whole of their rolling stock, whilst the railway is in operation, I am of opinion that in this case the company were justified in doing so. This was an interpleader issue to try the question of property in the rolling stock. The plaintiff, it seems, had commenced an action against the company, on behalf of those beneficially interested in a Lloyd's bond; and the defendant likewise had commenced proceedings against the company. The plaintiff compromised his action before judgment, and, in consideration of his so doing, the company transferred the rolling stock to him by way of security. The defendant, on the other hand, issued execution. Now, I think that the company had, under these circumstances, the same right to give the rolling stock to the plaintiff, who, upon obtaining it, forewent the judgment he would otherwise have obtained, as the defendant would have had to take it in execution if it had been left untransferred on the company's line. This being so, I think the learned judge properly excluded all evidence as to the circumstances under which the bond was originally given. Whatever they may have been, the plaintiff having commenced an action, and being in a condition to obtain judgment, and the company having consented to transfer the rolling stock to him without his carrying his action to a termination, the conveyance as between these parties was, in my opinion, founded on a good consideration. This rule, therefore, must be refused.

MARTIN, B. I am of the same opinion. I do not say that the shareholders of a railway company might not, under some circumstances, stop the transfer by the directors of the rolling stock on the line; or that the Attorney General, as the representative of the public, might not step in to prevent such a course being taken. But this is a question between two creditors of the company, and one with which neither the public nor the shareholders have anything to do. The plaintiff, or those for whom he was trustee, had actually advanced 10,000*l.* to the company. He afterwards brought an action on the bond given for that advance, and forbore to proceed with it to judgment, upon the company giving him their rolling stock as a security. The defendant is another creditor of

1867

BLACKMORE v. YATES.

the company, and having taken proceedings to recover his debt, issued execution. Then, as between these two creditors, I think the plaintiff had, under these circumstances, as good a right to the rolling stock as the defendant.

BRAMWELL, B. I am of the same opinion. Whatever the value of the bond might have been in the hands of the original obligee, in the hands of the plaintiff, who is the lender, or trustee for the lender, and who is not alleged to have had notice of the circumstances under which the bond was originally given, it furnished a good cause of action; and the agreement between the plaintiff and the company, therefore, is not void for illegality.

Rule refused.

Attorneys for defendant: *Marshall, Westall, & Roberts.*

April 18.

WALKER *v.* THE GREAT WESTERN RAILWAY COMPANY.

Railway Company—General Manager—Authority to bind Company to pay for Surgical Attendance on Injured Person.

2 QB. 538

The general manager of a railway company has, as incidental to his employment, authority to bind the company to pay for surgical attendance, bestowed at his request, on a servant of the company injured by an accident on their railway. *Cox* v. *Midland Counties Railway Company* (3 Ex. 268) considered.

THIS was an action brought to recover compensation from the defendants for surgical attendance rendered by the plaintiff to certain persons who, upon various occasions, had been injured on the defendants' railway. The defendants denied their liability.

At the trial before Pigott, B., at the last Worcestershire spring assizes, it appeared that the plaintiff sought, inter alia, to recover 44*l.* 16*s.* for medical services bestowed, under the express authority of the general manager, on a servant of the company who had been injured by an accident on their lines. The jury found a verdict for the plaintiff for the whole amount claimed, and leave was reserved to the defendants to move to reduce the damages.

Huddleston, Q.C., moved to reduce the damages by 44*l.* 16*s.* The general manager had no power to bind the company to pay for medical attendance. In this respect his authority is not more extensive than that of a station-master, who was held to be without such a power in *Cox* v. *Midland Counties Railway Company*. (1)

[MARTIN, B. When that case was decided, it was generally supposed that a company, except in some very few cases of daily recurrence, could only contract under seal. But there has been much more freedom in this respect accorded to companies since the time of that decision.]

That may have been one ground of decision, but another was the station-master's want of authority to make a contract binding his employers to pay for medical attendance, a matter entirely beyond the scope of his employment.

[KELLY, C.B. Surely there is a distinction between the authority which is possessed by a station-master, and that possessed by a general manager.]

Neither of them possess authority to engage a medical man on behalf of the company.

The Court (Kelly, C.B., Martin, Bramwell, and Pigott, BB.) held that the general manager had implied authority to employ the plaintiff, and refused the rule.

Rule refused.

Attorneys for defendants: *Young, Maples, Teesdale, & Nelson.*

(1) 3 Ex. 268.

1867
April 24.

COWAN *v.* MILBOURN.

Illegal Contract—Non-communication of Ground of Refusal to Complete—Blasphemous Publication.

4 Ad. & E. 471
5 C. & P. 424

The defendant contracted to let rooms to the plaintiff; afterwards, discovering that they were intended to be used for the delivery of lectures maintaining that the character of Christ is defective and His teaching misleading, and that the Bible is no more inspired than any other book, he refused to allow the use of them, but did not assign this as a reason for his refusal. In an action for breach of the contract:—

Held, first, that the publication of such doctrines was blasphemy, and that therefore the purpose for which the plaintiff intended to use the rooms was illegal, and the contract one which could not be enforced at law.

Secondly, that the defendant was entitled to justify his refusal on this ground, notwithstanding his having assigned a different reason.

Action (in the Court of Passage, Liverpool) for breach of a contract to let rooms to the defendant. The first and third counts of the declaration related to contracts to let to the defendant the St. Anne's Assembly Rooms, Liverpool, for the purpose of lectures, which were to be delivered there on the 20th of January and the 3rd of February, 1867; and the second count related to a contract to let the same rooms to the defendant for the purpose of a ball and tea-party on the 29th of January.

To these counts the defendant, amongst other pleas, pleaded, fourthly, that, after making the alleged agreements respectively, the defendant was informed, and learned for the first time, that the plaintiff intended (as he did in fact intend) to use the rooms for certain irreligious, blasphemous, and illegal lectures or entertainments; whereupon the defendant, within a reasonable time, after satisfying himself as to the truth of the premises, gave notice to the plaintiff that he could not permit the plaintiff the use of the rooms for the purposes aforesaid, and thereupon notified to the plaintiff not to incur any further or other expense in relation thereto; and in like manner, and within such reasonable time as aforesaid, tendered and paid to the plaintiff the amount of the moneys which the plaintiff had paid him for the intended use of the rooms; and that his refusal to permit the plaintiff under the said circumstances,

and for the said purposes, to use the rooms was the breach complained of.

The defendant, by his seventh plea, also relied upon the provisions of 21 Geo. 3, c. 49, s. 1.

Issue.

At the trial the following facts appeared in evidence :—

In December, 1865, the plaintiff, who was secretary to the Liverpool Secular Society, hired of the defendant, through defendant's son, the rooms in question, for Sunday, the 20th of January, for the purpose of having lectures delivered there in advancement of the views of the society. He did not communicate to the defendant the subjects of the lectures, nor that they were to be delivered in connection with the society. He afterwards hired the same rooms for the delivery of lectures on Sunday, the 3rd of February, and for a ball and tea-party in memory of Tom Paine, on the 29th of January. On the 5th of January the subjects of the lectures for the morning, afternoon, and evening of the 20th of January were advertised by placards as "The Soul: Its Nature and Destination." "*The Character and Teachings of Christ; the former Defective, the latter Misleading.*" "Bible Morality and Bible Science;" and those of the lectures for the 3rd of February as "The Sceptical Tendency of Bishop Butler's Analogy." "*The Bible shewn to be no more Inspired than any other Book;* with a Refutation of Modern Theories thereon." "Catholicism, Protestantism, and Secularism: which contains most Truth, and which is best calculated to benefit Humanity?"

On the 17th of January, the plaintiff received from the defendant's son a letter written the day previous, complaining of an evening lecture having been advertised, and alleging that the rooms were only let for the morning and afternoon, but making no complaint of the subject of the lectures; and on the 19th of January the ~~defendant~~ plaintiff received from the ~~plaintiff's~~ defendant's attorney a letter of that date, entirely refusing the use of the rooms, but not assigning any reason. The plaintiff, having attempted without success to obtain possession of the rooms on the days in question, brought this action for breach of the several contracts.

It appeared upon the evidence of the chief constable of Liverpool, who was called for the defendant, that the defendant's refusal

1867

COWAN v. MILBOURN.

was caused by his interference, and by his threatened opposition to a renewal of the licence attached to the rooms.

The learned judge ruled that the lectures announced were blasphemous and illegal, and that the plaintiff could not therefore recover on the agreement for the Sundays (20th of January and 3rd of February), but that he might recover on the agreement relating to the tea-party of the 29th of January; and a verdict for one farthing damages was found for the plaintiff on the second count, and a verdict was entered for the defendant on the first and third counts, with leave to the plaintiff (under 16 & 17 Vict. c. xxi. s. 45) to move this Court to enter a verdict for the plaintiff for 10*l.* on each of those counts.

Littler moved accordingly. First, the allegation of blasphemy in the plea is not proved, for the only evidence of the character of the lectures is that afforded by the advertisements, which shew nothing falling within that description. The test of blasphemy lies rather in the manner than the matter of what is said, and the current opinion in modern times has been that to support a prosecution for blasphemy there must be a scurrilous and indecent attack upon commonly received opinions, or a maintenance of views flagrantly opposed to ordinary morality. This is the view expressed in Blackstone's Commentaries, vol. iv. p. 51 (1), and the same opinion is stated at length in Starkie on Libel, 1st ed. pp. 496-7, cited and adopted in Russell on Crimes, 4th ed. vol. ii. pp. 334-5; and it is stated to the same effect, though in somewhat different terms, in the 2nd edition of Starkie, vol. ii. pp. 146-7. (2)

(1) "Though it is clear that no restraint should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship, yet contumely and contempt are what no establishment can tolerate."

(2) The passage in the earlier edition of Starkie, pp. 496–7, cited in Russell on Crimes, vol. i. p. 334, is as follows: "It may not be going too far to infer from the principles and decisions, that no author or preacher who fairly and conscientiously promulgates the opinions with whose truth he is impressed, for the benefit of others, is, for so doing, amenable as a criminal; but a malicious and mischievous intention is in such cases the broad boundary between right and wrong; and thus, if it can be collected, from the offensive levity with which so serious a subject is treated, or from other circumstances, that the act of the party was malicious, then, since the law has no means of distinguishing between different degrees of evil ten-

That opinion is further supported by the remarks of Best, J., at the close of his judgment in *The King* v. *Waddington*. (1) If this is so, it follows that a lecture of this nature is not illegal.

[BRAMWELL, B. Not so; an act may be illegal in the sense that it will not be recognised by the law as capable of being the foundation of any legal right, or that it may even deprive what it accompanies of that capacity, although it is followed by no penalty. The very point was illustrated by the case of *Pearce* v. *Brooks* (2) in this court.]

So far as relates to the subject of the character and teaching of Christ, the Act of relief of 53 Geo. 3, c. 160, s. 2, exempts the plaintiff from the charge of illegality.

[BRAMWELL, B. Only from the penalties imposed by 9 & 10 Wm. 3, c. 32, and from the penalties and disabilities to which Unitarians still remained subject in consequence of their exclusion from the benefits of the Act of Toleration, 1 Wm. & M. sess. 1, c. 18, s. 17.]

With respect to the lecture on the authority and inspiration of the Scriptures, it can scarcely be said to be illegal to question their

---

dency, if the matter published contain any such tendency, the publisher becomes answerable to justice."

The passage in the later edition, vol. ii. pp. 146-7, is as follows: "The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but, be this as it may, the law interferes not with his blunders so long as they are honest ones. . . . It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or (what is equivalent to such an intention in law as well as in morals) a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication—from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons and subjects—that the design of the author was to occasion that mischief to which the matters which he publishes immediately tends—to destroy, or even to weaken, men's sense of religious or moral obligations—to insult those who believe, by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship into disgrace and contempt—the offence against society is complete."

(1) 1 B. & C. 26, at p. 28.

(2) Law Rep. 1 Ex. 213, 12 Jur. N.S. 342

1867

COWAN v. MILBOURN.

exclusive inspiration after the decision of the Privy Council in *Bishop of Salisbury* v. *Williams*. (1)

[BRAMWELL, B. The act of 53 Geo. 3, c. 160, does not repeal that part of 9 & 10 Wm. 3, c. 32, s. 1, which is directed against those who "shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority," and who shall on indictment or information be convicted thereof.]

It has not been commonly supposed that the recent attack on the Pentateuch by Bishop Colenso laid him open to such an indictment.

Secondly, the plea is not proved, because the reason alleged in it was not the reason given by the defendant when he refused the use of the rooms.

KELLY, C.B. It would be a violation of duty to allow the question raised to remain in any doubt. That question is, whether one who has contracted to let rooms for a purpose stated in general terms, and who afterwards discovers that they are to be used for the delivery of lectures in support of a proposition which states, with respect to our Saviour and His teaching, that the first is defective and the second misleading, is nevertheless bound to permit his rooms to be used for that purpose in pursuance of that general contract. There is abundant authority for saying that Christianity is part and parcel of the law of the land; and that, therefore, to support and maintain publicly the proposition I have above mentioned is a violation of the first principles of the law, and cannot be done without blasphemy. I therefore do not hesitate to say that the defendant was not only entitled, but was called on and bound by the law, to refuse his sanction to this use of his rooms. It is contended that this was not the real motive which actuated the defendant, and that the evidence shewed another and different motive, and that this reason was put forward only as an excuse. But I am of opinion that, whatever may have been the motive operating on his own mind, it was open to him by law, at the last moment before the rooms had been taken possession of, to refuse their use, and to justify that refusal on the ground that the plaintiff had in fact this purpose in view.

(1) 2 Moore, P. C. (N.S.) 375.

MARTIN, B. I am quite of the same opinion. I protest against the notion that this is any punishment of the persons advocating these opinions. It is merely the case of the owner of property exercising his rights over its use.

BRAMWELL, B. I am of the same opinion, and I will state my grounds. I think that the plaintiff was about to use the rooms for an unlawful purpose, because he was about to use them for the purpose of, "by teaching or advised speaking," "denying the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority." That he intended to use the rooms for the purposes declared by the statute to be unlawful is perfectly clear, for he proposed to shew that the character of Christ was defective, and His teaching misleading, and that the Bible was no more inspired than any other book. That being so, his purpose was unlawful; and if the defendant had known his purpose at the time of the refusal, he clearly would not have been bound to let the plaintiff occupy them, for, if he would, he would then have been compelled to do a thing in pursuance of an illegal purpose. Neither if he had let the plaintiff into possession could he, for the same reason, have recovered the price for their letting. It is said, he did not know of this purpose, or, at least, did not regard it, and gave another and different reason. But, having refused to let the rooms, he might justify it on any ground that would support the refusal. This is laid down in *Spotswood* v. *Barrow* (1), where in an action for wrongful dismissal the defendant justified on the ground that the plaintiff had misappropriated moneys, and the Court held that the plea was supported, although the defendant failed to shew that the fact was known to him before he dismissed the plaintiff. Rolfe, B., there says (2): "The subject may be illustrated by what was said in *Doe* d. *Daniell* v. *Woodruffe* (3), viz. "where a party having a right of entry enters, it is not competent for him to repudiate any rights he may possess, and to say he has entered as a trespasser, or by some other than his real title. As soon as he has entered he is possessed, whether he will or no, by virtue of every

(1) 5 Ex. 110. (2) At p. 113.
(3) 10 M. & W. 608, at p. 632.

1867

COWAN v. MILBOURN.

title which he had in him, and which he could assert by entry. Littleton, s. 695, is there referred to; and that old authority seems to me to be founded on very good sense." This appears to me to be good law, and the reason of it is apparent. You need give no reason at all. If you refuse to perform your contract, and the other party asks why, you may say, "Go to law and I will tell you." And your justification will depend on whether in fact and law he could compel you to perform. Now it appears that the plaintiff here was going to use the rooms for an unlawful purpose; he therefore could not enforce the contract for that purpose, and therefore the defendant was not bound, though he did not know the fact. It is strange there should be so much difficulty in making it understood that a thing may be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it. If that only were unlawful to which a penalty is attached, the consequence would be that, inasmuch as no penalty is provided by the law for prostitution, a contract having prostitution for its object would be valid in a court of law. The rule must be refused, and I do not regret the result, and on this ground, that this placard must have given great pain to many of those who read it.

Rule refused.

Attorneys for plaintiff: *Duke & Goffey, Liverpool.*

ELLIOTT *v.* THE ROYAL EXCHANGE ASSURANCE COMPANY.[1]

1867
May 1.

Insurance—Fire Policy—Arbitration Clause—Condition precedent and collateral Covenant—Construction.

In a policy of fire insurance entered into by the plaintiff with the defendants the covenant for payment was made subject to certain articles; one of which provided that, on a loss occurring, the assured should within fifteen days send in particulars of his loss, "which loss or damage, after the same shall be adjusted, shall immediately be paid in money by" the defendants, with an option to them to reinstate, and a proviso that "in case any difference shall arise touching any loss or damage, such difference shall be submitted" to arbitrators, "whose award in writing shall be conclusive and binding on all parties; but if there shall appear any fraud or false swearing, the claimant shall forfeit all benefit of his claim." In an action brought on this policy to which the defendants pleaded this article, and that the plaintiff had not submitted the matter to arbitration:—

Held on demurrer (Bramwell, B., dissenting), that the covenant was only a covenant to pay the adjusted loss, and that the plaintiff had no cause of action.

DECLARATION on a policy of fire insurance under seal, by which the defendants "declared that the capital, stock, estates, and securities of the defendants should be subject and liable to pay, make good, and satisfy to the plaintiff, any loss or damage by fire to the goods aforesaid, which should or might happen on or before the 24th of June, 1867, not exceeding the sum of 2200*l.*, according to the exact tenour of the articles thereunto subjoined;" alleging a loss to the full amount.

Plea, that one of the articles subjoined to the policy (article 10) was of the tenour and effect following: "All persons assured by this corporation are, upon any loss or damage by fire, forthwith to give notice thereof to the office in London, or to the known agents of the said corporation, and within fifteen days after such fire, deliver as particular an account of their loss or damage as the nature of the case may admit, and make proof of the same by their oath or affirmation, and that of their domestics or servants, and by their books of accounts, or such other proper vouchers as may be required; which loss or damage, after the same shall be adjusted, shall immediately be paid in money by the said corporation, without any deduction; or they shall at their option forthwith provide or supply the assured with the like quantity and quality of goods with those burnt or damaged by fire; or at the expiration of sixty

1867

ELLIOTT v. ROYAL EXCHANGE ASSURANCE CO.

days after notice of the said fire, they shall expend in rebuilding or repairing any building damaged or destroyed by fire the sum assured thereon, under the direction of able and experienced workmen, if the loss and damage shall, in their opinion, amount thereto. In case any difference shall arise touching any loss or damage, such difference shall be submitted to the judgment and determination of arbitrators indifferently chosen, whose award in writing shall be conclusive and binding on all parties; but if there shall appear any fraud or false swearing, the claimant shall forfeit all benefit of claim;" alleging that the loss sued for had not been adjusted according to the articles, that a difference arose between the plaintiff and the defendants touching the alleged loss, which the defendants had always been willing to refer in the manner mentioned in the articles, whereof the plaintiff had notice, but that the plaintiff refused, and that the difference had never been submitted to arbitration, nor the alleged loss or damage adjusted.

Demurrer and joinder.

Lumley Smith (*Mellish, Q.C.*, with him), in support of the demurrer. The provision relied upon by the defendants is no bar to this action, but is only a collateral covenant, on which, if it is broken, they can sue. According to the decisions of *Scott* v. *Avery* (1), and *Horton* v. *Sayer* (2), the question in such cases is, whether the provision is a condition precedent to the right to payment, or is only a collateral covenant; and in order to bring the case within the first class, it is necessary that there should be words clearly expressing such an intention. In *Scott* v. *Avery* (1), there were such words, for the contract not only provided that the loss should in the first instance be ascertained by the committee, and that if a difference should arise between the committee and a member the matter should be referred to arbitration, but it was further provided, as "part of the contract of insurance between the members of this association," that no member refusing to accept the amount of any loss as settled by the committee should be entitled to maintain any action at law or suit in equity, until the matters in dispute had been arbitrated upon, and then only for the

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.
(2) 4 H. & N. 643; 29 L. J. (Ex.) 28.

sum awarded, and the obtaining the decision of arbitrators was declared to be a condition precedent to the right of any member to sue. But if, as in *Horton* v. *Sayer* (1), the contract is not drawn in this form, but only contains a collateral covenant, it cannot oust the jurisdiction of the courts of law. In the case of *Braunstein* v. *Accidental Death Insurance Company* (2), although there were no negative words, the covenant was only to pay such sum "as should appear just and reasonable . . . . such sum to be ascertained in case of difference," as provided in the conditions; until ascertainment, therefore, there was no cause of action. But here there are neither negative words, nor is the sum to be paid made dependent upon its ascertainment by adjustment or arbitration; but the agreement is, to pay the loss, with an independent provision for settling the amount. The case rather resembles that of *Roper* v. *Lendon* (3), where the words were identical with those here used, except that there was an independent clause (cond. 10) to the effect that the loss should be paid immediately after the same should have been established to the satisfaction of the directors. But that clause is of precisely the same effect as the words here, "which loss or damage, after the same shall be adjusted, shall be immediately paid;" they have relation only to the time when the payment is to be made. The decision there was, that the provision was only a collateral stipulation, and where the natural effect of the words is the same, the fact of their being put in the same or a different clause cannot alter their construction. If the clause were that the amount of the adjusted loss should be paid, and no method were provided for adjustment, the plaintiff would not be precluded from suing; but the article at any rate says no more than this, for the words as to adjustment have no reference to the subsequent clause relating to differences; they do not say "adjusted as hereinafter provided;" and, therefore, all they can be taken to mean is, that there shall be an attempt at a settlement between the parties. This clause was drawn long before the decision in *Scott* v. *Avery* (4) had shewn the possibility of a valid arbitration clause, and must be

(1) 4 H. & N. 643; 29 L. J. (Ex.) 28.
(2) 1 B. & S. 782; 31 L. J. (Q.B.) 17.
(3) 1 E. & E. 825; 28 L. J. (Q.B.) 260.
(4) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

1867

ELLIOTT v. ROYAL EXCHANGE ASSURANCE CO.

taken to have been framed with reference to the then state of authority, and without the intention of binding parties conclusively in this mode. Had they intended to avail themselves of the privilege which *Scott* v. *Avery* (1) secured for them, the defendants should have framed their policy anew upon that case, as was done in the policy sued upon in *Braunstein* v. *Accidental Death Insurance Company*. (2) The defendants had their true remedy, which was to apply for an order of reference, on the delivery of the declaration, under 17 & 18 Vict. c. 125, s. 11.

[BRAMWELL, B. Suppose the plaintiff made a claim to which the defendants agreed, that would be an adjustment. But suppose the plaintiff afterwards clearly proved that he had omitted some article, could he recover for its value? It appears to me it was not intended to exclude him, but if so, adjustment must be only evidence.]

This would be in accordance with the view taken of adjustment clauses in Arnould Ins. (3rd ed.) vol. ii. p. 998, and the case there cited of *Luckie* v. *Bushby*. (3) The effect of that case is that adjustment is only evidence for the jury, and that the assured can sue for unliquidated damages.

Hawkins, Q.C., in support of the plea. It is not denied by the plaintiff that the contract, construed according to the defendants' construction, would be lawful; and it is certainly beneficial. The purpose is to ascertain, independently of all other questions relating to the liability of the company, the actual amount of loss suffered by the assured, and which is a matter that a jury can never satisfactorily determine. No wrong or injustice is, therefore, done to the plaintiff; and if the words bear the meaning contended for by the defendants, there is no reason why effect should not be given to them. Now, the agreement sued on clearly incorporates the articles by reference, stipulating that the loss shall be paid for according to their exact tenour; and the article set out in the plea in substance describes the adjusted sum as the sum to be paid to the assured. The words, "after," &c., shew that the adjusting is a condition precedent to the right to sue, and bring

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.
(2) 1 B. & S. 782; 31 L. J. (Q.B.) 17.
(3) 13 C. B. 864; 22 L. J. (C.P.) 220.

the case within the decision of *Scott* v. *Avery*. (1) The authority of *Roper* v. *Lendon* (2), which is cited in support of the plaintiff's contention, is weakened by the fact that there was no discussion upon the plea raising this question, but that point was abandoned in the argument, the more readily, perhaps, because of the other plea, on which judgment was given for the defendants, and which went to the whole action. On the latter point the Court held that the delivery of particulars was a condition precedent; and that decision is supported by *Mason* v. *Hervey* (3), and is in favour of the defendants. But, further, the application of *Roper* v. *Lendon* (2) to the case fails, on account of the absence of any separate clause here answering to the 10th condition in that case. *Tredwen* v. *Holman* (4) is a recent authority in the defendants' favour. It is true that the policy there contained the clause that no action should be brought until the arbitrators had given their decision; but if there are words sufficient to indicate that this is the intention of the parties, it is not necessary to have an express negative. And, upon the other hand, *Horton* v. *Sayer* (5) shews that the mere presence of such negative words will not of itself aid the defendants, since they did not there avail to prevent the Court from deciding in the plaintiff's favour. The real question is, whether, on the whole, taken together, the intention is apparent to make a reference a condition precedent.

Lumley Smith, in reply.

KELLY, C.B. The question in this case is, whether the plaintiff is entitled to recover the amount of a loss by fire which he has suffered, and for which he claims to be compensated under a policy effected with the defendants, such loss not having been adjusted as pointed out in the articles subject to which the policy was made. The form of the policy is a covenant, by the defendants, that their capital, stock, &c., shall be subject to make good the plaintiff's loss, not exceeding the sum of 2200*l*., "according to the exact tenour of the articles thereunto subjoined."

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308, 2 Jur. N.S. 815.
(2) 1 E. & E. 825; 28 L. J. (Q.B.) 260, 5 Jur. N.S. 491
(3) 8 Ex. 819; 22 L. J. (Ex.) 336.
(4) 1 H. & C. 72; 31 L. J. (Ex.) 398. 8 Jur. N.S. 1080
(5) 4 H. & N. 643; 29 L. J. (Ex.) 28. 5 Jur. N.S. 989

1867

ELLIOTT v. ROYAL EXCHANGE ASSURANCE CO.

If the sentence had stopped at the figures 2200*l.*, and in a subsequent part of the instrument there had been independent provisions which might be supposed to have qualified these words, it might have been a question of greater doubt, whether those provisions were to be held a condition precedent, or a collateral stipulation which could not avail to oust the jurisdiction of the Court. But the covenant is itself, in its very terms, qualified and made conditional by the subsequent words referring to the articles, which, following without any interval, form an integral and substantial part of the covēnant. Therefore, in order to ascertain whether, where a loss has been sustained by the insured, a right of action has accrued to him, we must look at the articles "according to the exact tenour" of which the insurance is to be paid. Now, the 10th article provides that, upon the occurrence of any loss or damage by fire, the party is forthwith to give notice to the office, and within fifteen days to deliver in a particular account of his loss, evidenced and verified as may be required, "which loss or damage, after the same shall be adjusted, shall immediately be paid in money," with an option to the company to reinstate. Collecting the meaning of the parties from the language used by them in this sentence, and putting on it the ordinary and usual construction, the effect is, not that the plaintiff is, in the event of loss, entitled immediately to recover the amount of his loss; but what he is entitled to recover is the amount of the loss after it has been adjusted, which means, adjusted between the parties in the manner pointed out by the subsequent article. It appears to me that to decide to the contrary would be to disregard entirely the obvious intentions of the parties, expressed in words which state emphatically that before the loss is paid its amount shall be adjusted.

We were pressed with the weight of authority, and it was ably argued that it was impossible to decide in favour of the defendants consistently with prior decisions, and with the well recognised principle that no contract shall oust the jurisdiction of the courts of law; and it was urged that the contract was neither more nor less than a contract on the part of the company to make good the loss, with a separate and collateral stipulation that the amount should be referred to arbitration. It is, no doubt, difficult to

reconcile and give effect to two propositions so nearly in direct opposition as that no contract of the parties shall oust the jurisdiction of the courts, and that, on any difference arising between two parties, it shall be referred to arbitration. But the fair result of the authorities is, that if the contract is in such terms that a reference to a third person, or to a board of directors, is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until that condition is complied with; but if, on the other hand, the contract is to pay for the loss (or other matter in question), with a subsequent contract to refer the question to arbitration, contained in a distinct clause collateral to the other, then that contract for reference shall not oust the jurisdiction of the courts, or deprive the party of his action. Now it seems to me impossible, without directly overruling or disregarding the decision of the House of Lords in *Scott* v. *Avery* (1), to say that the stipulation here is not a condition precedent. There the words were, that "the sum to be paid by this association to any suffering member for any loss or damage shall, *in the first instance, be ascertained* by the committee." Here they are, that the loss, "*after the same shall be adjusted,* shall immediately be paid." In both cases a stipulation follows, that any difference arising between the parties shall be referred to arbitration. The House of Lords in that case having held that the ascertainment of the loss by the committee or by arbitration was a condition precedent, and that without such ascertainment the plaintiff had no cause of action, I cannot see any distinction which would justify us in holding here that the adjustment of the loss as provided in the articles was not a condition precedent. All the cases cited were in favour of the defendants' contention with the exception of *Horton* v. *Sayer* (2) and *Roper* v. *Lendon* (3), which were both decided on the ground that the agreement to refer was only a collateral stipulation. In the latter case the Court came to that decision on a contract very much resembling the present one. I do not enter into the question whether the true construction was put on the instrument in that case; the point

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.
(2) 4 H. & N. 643; 29 L. J. (Ex.) 28.
(3) 1 E. & E. 825; 28 L. J. (Q.B.) 260.

1867

ELLIOTT v. ROYAL EXCHANGE ASSURANCE CO.

seems to have been given up early in the argument, and the matter was hardly discussed. But on another part of the same contract, words contained in one of several conditions, subject to which the policy was made, were held to constitute a condition precedent, and that part of the decision rather supports our present judgment. This contract, I think, speaks plainly to the effect I have stated, and my judgment, therefore, is for the defendants.

MARTIN, B. I am of the same opinion. It seems admitted on both sides that if on the construction of the contract the parties appear to agree that, before a court of law interferes with the matter, it shall be investigated by another tribunal, in such a manner that the decision of that tribunal is necessarily involved in the matter which the court of law is to adjudicate upon, that stipulation is lawful and must be complied with. But if the contract is merely that, if a dispute arises, it shall be referred to arbitration, without any such provision as I have referred to, it is otherwise; and probably if the stipulation were accompanied by a declaration that no action should be brought, it would be none the more invalid and ineffectual. At least, no case says that the parties may contract that a matter shall never be heard in court, and my impression is, that it would be against the liberty and dominion of the law. If, therefore, the parties have here agreed that it should be necessary before bringing any action that there should be a preliminary inquiry, this condition must be complied with. In construing the contract we must consider what is its nature. It is a policy of insurance, and it is well known to every one that on such a contract there is constantly a dispute as to the value of the articles for which compensation is claimed. It is equally well known that this is a question which a jury cannot try, and that if the matter is allowed to go into court, the parties, after incurring all that expense, may have to go to arbitration. Therefore, assuming the parties to be aware of this, it is the part of wise men to agree that the question of value shall be so determined at the outset. Now, the first stipulation is, that the assured shall within fifteen days send in a particular account of his loss. It seems to me that this is clearly a condition pre-

cedent, and it was so decided in *Roper* v. *Lendon*. (1) The article then provides for the payment of the money after it has been adjusted, but reserves to the company an option of reinstating or rebuilding; so that we have two provisions, both of which are in the nature of conditions precedent, and there then follows a provision that in case any difference shall arise it shall be submitted to arbitration; and the question is, whether this is of the same character as the others. Treating the question merely as a matter of construction of the words themselves, I do not think the matter quite clear; but, taken in connection with the context, they may well bear the meaning contended for by the defendants. There is one part of the clause which influences me in coming to this conclusion. It is that which provides that "if there shall appear any fraud or false swearing, the claimant shall forfeit all benefit of claim." Considering the relation of the parties, this is not an unreasonable stipulation; but unless the defendants' construction is right, the office cannot have the benefit of it, for it only applies to the mode of ascertaining the amount of compensation there provided for.

BRAMWELL, B. I think the plaintiff is entitled to judgment. I agree that there is no great doubt as to the law, nor did I ever think there was, even before the decision in *Scott* v. *Avery*. (2) In the argument of that case (the arbitration clause in which was framed by Mr. Justice Cresswell), Mr. Manisty and myself were counsel for the defendants. We scarcely cited a case, but laid down a proposition which was almost immediately adopted by the judges below, and by the House of Lords. That proposition was that if two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum. For

(1) 1 E. & E. 825; 28 L. J. (Q.B.) 260.
(2) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

1867

ELLIOTT v. ROYAL EXCHANGE ASSURANCE CO.

to say the contrary would be to give the party a different measure or rate of compensation from that for which he has bargained. This is plain common sense, and is what I understand the House of Lords to have decided in *Scott* v. *Avery*. (1) Now the construction of this policy appears to me far from clear, upon the point whether the defendants agree to pay the adjusted amount, or whether they agree to pay the actual loss, with a provision for adjusting the loss. If the latter is the true construction, then the principle of *Scott* v. *Avery* (1) does not apply, or rather it applies to exclude them from their defence. The words of the policy are, that the defendants will pay to the plaintiff "any loss or damage by fire," according to the tenour of the articles. The articles (which are thus part of the covenant) then say "which loss or damage, *after* the same shall be adjusted, shall immediately be paid." To my mind, these words refer not to an essential term of the covenant (which I prefer to the phrase, condition precedent), but to the time when the payment is to be made, that is, immediately after the adjustment. This verbal examination may seem critical, but it is called for; for if the adjusted loss only is stipulated to be paid, the consequence will be, that if the assured after the adjustment discovers that something has been burned which has been bonâ fide omitted from his claim, he will be precluded by this clause from recovering for it. But I do not think that it was in the contemplation of the parties to be so irrevocably bound. If not, then the agreement is to pay, not the adjusted, but the actual amount, with a proviso for settling the matter in case of dispute. The clause goes on to say, that the defendants may at their option restore; so that it is not merely their intention to pay the adjusted loss. It is then provided that, in case "any difference shall arise touching any loss or damage," it shall be settled by arbitration. Now, it is impossible to say that this is merely a substitute for adjustment between the parties, for under these words the arbitrator would have power, not merely to adjust the amount that shall be paid, but to determine whether the plaintiff shall have any payment at all, or whether by reason of non-payment of premiums or of fraud he has forfeited his right to recover. I think, therefore, that this is a collateral agreement to refer to arbitra-

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

tion, and not an agreement that only the adjusted loss shall be paid.

PIGOTT, B. I agree with the Chief Baron and my Brother Martin. The principle of law is conclusively settled by *Scott* v. *Avery* (1), and all we have to do is to examine the construction of the document. Now, certainly the articles are incorporated with the policy, for the payment is to be made according to the exact tenour of the articles. We must, therefore, look at the provisions of the 10th article; and I cannot take the view adopted by my Brother Bramwell, that the word "after" shews that the clause has relation only to the time when the loss is to be paid, and thus makes the agreement only a collateral stipulation. I rather think that it points to *what* the office covenants to pay, and that, notwithstanding the use of the adverb of time, the covenant is only to pay the adjusted loss; that there was, therefore, no duty to pay, and therefore no breach of the covenant, until the loss had been ascertained in the manner there pointed out. My Brother Bramwell has dwelt upon the injustice and hardship which might follow from this construction, where the assured has omitted something from his claim. But the same might be said of an action tried out and a verdict given. There must be some time when the rights of parties are conclusively and finally ascertained, and there must, therefore, always be the chance of some loss being suffered by ignorance or carelessness. But we have to inquire what the parties meant by the words they have used, and my opinion is in favour of the defendants' construction.

Judgment for the defendants.

Attorneys for plaintiff: *Mason, Sturt, & Mason.*
Attorneys for defendants: *E. & W. Richards.*

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

1867

May 11.

FALCONAR *v.* McKENZIE.

Trader-Debtor Summons—Bankrupt Law Consolidation Act, 1849 (12 & 13 *Vict.* c. 106), *s.* 86—*Costs—Construction.*

Where a creditor, having taken out a trader-debtor summons against his debtor, and filed an affidavit of debt under s. 78 of 12 & 13 Vict. c. 106, recovers in an action for the debt less than the amount sworn to in the affidavit, and the defendant applies to the Court for an order for costs under s. 86, the Court, on being satisfied of the absence of reasonable and probable cause for swearing to the amount in the affidavit, is bound to make the order, no discretionary power to withhold it being given by the section.

THE plaintiff took out a trader-debtor summons against the defendant, under s. 78 of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), making an affidavit of a debt exceeding 100*l.* for beer supplied. The defendant denied the debt, and the plaintiff brought this action, in which he recovered only 64*l.*, as it appeared that part of the debt was covered by bills still running. A rule having been obtained, calling on the plaintiff to shew cause why the defendant should not have his costs allowed, under s. 86,

Temple, Q.C., and *Gainsford Bruce*, shewed cause. They contended that s. 86 requires two conditions to be satisfied before the defendant can claim his costs: first, "provided that it shall be made appear to the satisfaction of the Court" that the plaintiff "had not any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid;" and secondly, "provided such Court shall thereupon, by rule or order, direct that such costs shall be allowed to the defendant." Admitting that the first condition would be satisfied, they contended that the second made the allowance of costs discretionary in the Court; and they proposed to shew circumstances which made it unfit that the defendant should in this case have costs.

Manisty, Q.C., in support of the rule, was not called on.

BRAMWELL, B. We are both of opinion that we have no discretion in the matter, and that the rule must be made absolute. No doubt the repetition of the word *provided* gives some ground for the plaintiff's contention; but it is evidently used carelessly, and only as making the "rule or order" a necessary condition to

entitle the defendant to his costs, and to the incidental advantages given him by the section; otherwise the act would have said that the costs should be allowed, if it appears to the satisfaction of the Court that there was no reasonable or probable cause for the affidavit, and if (speaking negatively) no reason appears why they should not be allowed. Moreover, the statute has given no rule to guide our discretion. Are we to determine the question by reference to the conduct of the defendant in the action, or in any other matter, or to the fact of one party being rich and the other poor,—or with reference to what circumstances are we to exercise our judgment? In the absence of any indication of such a rule, the words cannot mean more than that the Court, on being satisfied of the first point, shall thereupon allow the defendant his costs.

PIGOTT, B., concurred.

Rule absolute.

Attorneys for plaintiff: *Pattison & Wigg, for J. B. Falconar, Newcastle-upon-Tyne.*

Attorneys for defendant: *J. & J. K. Wright, for W. A. Oliver, Sunderland.*

MILNER *v.* RAWLINGS.

May 11.

Deed under s. 192 *of the Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134)—*Execution —Undertaking by Attorney.*

The plaintiff issued execution, after notice that a composition deed under s. 192 of the Bankruptcy Act, 1861, was about to be registered by the defendant; the defendant's attorney gave notice of the same fact to the sheriff's officer, who withdrew on having the attorney's undertaking for the amount of the debt and costs, after refusing to withdraw on any other terms. At the time the undertaking was given the deed was in fact registered, and contained a release of all the creditors' "claims and demands." The defendant having paid to the sheriff the amount of the undertaking under protest, and the sheriff having paid the same into court, the defendant moved to have the money paid out to him:—

Held, that the defendant was entitled to the money, inasmuch as the money represented the proceeds of the execution, and the plaintiff was not, at the time the undertaking was given, in a position in which he could have derived any benefit from the execution if it had been proceeded with.

ON the 15th of January the plaintiff commenced this action against the defendant under the Bills of Exchange Act, 1855. On

1867

MILNER v. RAWLINGS.

the 25th the defendant's attorneys gave notice to the plaintiff's attorneys that the defendant had on that day executed a composition deed under s. 192 of the Bankruptcy Act, 1861; but the plaintiff proceeded with his action, signed judgment on the 29th, and on the same day issued execution. On the 30th the sheriff of Warwickshire levied on the defendant's premises, and advertised a sale for the 1st of February. The defendant's attorneys applied to the bailiff in possession to abstain from selling, but the bailiff declined to do so, unless they would give an undertaking to pay the debt and costs; and accordingly, at about half-past seven P.M. on January 31, they gave the undertaking, and the officer then retired from possession and withdrew the handbills. The deed had in fact been already registered at two P.M. on the same day. It contained a release of "all claims and demands." In pursuance of the undertaking the defendant on the 4th of February paid to the officer the amount of the debt, costs, and poundage, with a protest that the plaintiff was not entitled to the money, and a notice that he should claim to have it returned. The sheriff took out an interpleader summons, on the hearing of which Martin, B., ordered that the sum of 35*l.* 7*s.* 1*d.*, being the amount paid to the sheriff after deducting his fees, should be paid into court; discharged the sheriff; directed that there should be no action; and ordered that the question between the plaintiff and defendant should be brought before the Court on special case or motion.

May 11. *L. Kelly* moved on behalf of the defendant for the payment of the money to him. First, the deed, which contains a release of all claims and demands, and which on its registration bound the plaintiff, was, at the time this undertaking was given, already registered. The plaintiff's execution was therefore gone (the words "claims and demands" being sufficient to release it: Bac. Abr. tit. Release (I.)), and there was no consideration for the undertaking. Secondly, the undertaking was obviously meant only to stand in lieu of and to preserve intact the rights of the parties as they existed at the moment when it was made, and it will follow their condition. Now, by s. 197 of the Bankruptcy Act, 1861, after the registration of the deed, all the rights of the creditors are

governed by the rules of bankruptcy. But by reason of s. 184 of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), which must, according to the decision in *O'Brien* v. *Brodie* (1), be construed strictly, and the policy of which is extended by s. 73 of the Bankruptcy Act, 1861, the execution here could not have profited the creditor, since the registration had already taken place when the undertaking was given, and before execution by seizure *and sale*. A sale even on the day advertised would have been too late, and the creditor must have repaid the money.

Macnamara shewed cause in the first instance. Admitting the positions alleged on the other side, the plaintiff is entitled to the money. The defendant must be taken to have paid it when the undertaking was given, and he or his agent then knew the facts, or, which is the same thing, had the means of knowledge; he cannot therefore now recover it back, even though he was not originally compellable to pay it: *Boyle* v. *Blackstock*. (2) But in fact there was a good consideration for the undertaking, for it purchased the withdrawal of the sheriff, and since at that time neither he nor the plaintiff had notice of registration, the execution was still "available," and the sheriff's act in proceeding with it would have been perfectly legal. In any case, it averted the injury of a sale, which could only have been prevented, if at all, by an application to the Court, and the relief of the defendant from the necessity of making this application was itself a sufficient consideration. But further, this money was paid to satisfy the attorneys' undertaking, and the cases shew that where an attorney has given an undertaking, the Court will enforce it, even though it would not be enforceable as an ordinary contract. Both points are illustrated by *Atkinson* v. *Bayntun* (3), and *Butcher* v. *Steuart* (4), where the alleged invalidity of an execution was held to be no answer to an undertaking by which the defendant was released from custody under it. The second is illustrated by *Re Hilliard* (5), where the undertaking was invalid under the Statute of Frauds; and by *Hellings* v. *Jones* (6), where an undertaking for payment of the plaintiff's costs, given on an agreement being made to enter

(1) Law Rep. 1 Ex. 302; 12 Jur. N.S. 527
(2) 8 L. T. (N.S.) 641.
(3) 1 Bing. (N.C.) 444; see pp. 457-8.
(4) 11 M. & W. 857, at pp. 875-6.
(5) 2 D. & L. 919.
(6) 10 J. B. Moore, 360

1867

MILNER v. RAWLINGS.

a stet processus, was enforced against the attorney, although the defendant died insolvent before taxation or expiration of the time for putting in bail.

BRAMWELL, B. I think this rule should be made absolute; and the conclusion is plain, when we consider who are the parties claiming this money. The one is the plaintiff in the action; he claims money in the hands of the sheriff, and he can only do so on the assumption that it is the proceeds of the execution. Now, suppose the sheriff had returned *nulla bona*, and the plaintiff had brought an action against him for a false return, would not the sheriff have had a perfectly good defence? That return means, in substance, that there are no goods available for the purposes of the execution. If wrong goods were taken by the sheriff, and were sold by him, or their value paid to him, he would be justified in returning the money realized to the person to whom the goods belonged, and in making this answer to the judgment creditor. That is the case here, and, therefore, the return would be perfectly good, and the sheriff would have a complete defence to the action. If this is so, it shews to demonstration that the plaintiff is not entitled to the money. Further, with respect to the point that an undertaking was here given by the attorney, this was done on behalf of his client, though without authority; his client has since ratified his act, and now claims the money which he has paid in pursuance of it; and he is entitled to do so. I am satisfied that, in making this decision, we are doing nothing opposed to the authorities cited to us; we certainly have no such intention.

PIGOTT, B. I am of the same opinion. We must see on what terms this money was paid. If it was paid to release the goods from the execution, then, without reference to what were at that time the rights of the parties, the plaintiff is entitled to it. But, was that the meaning of the transaction? I think not; but rather that the execution debtor by his attorney claimed to be entitled to the benefit of a composition deed already executed and assented to, and then either actually registered or shortly about to be so, and meant to do what he could to try the right in the best and

1867

MILNER v. RAWLINGS.

safest way. He, therefore, deposits the money to abide the event. It now turns out that the deed was already registered, although, owing to the execution being levied in the country, the fact was not known to the parties; so that, if they had merely allowed things to take their course, and done nothing, the sheriff could not lawfully have proceeded with the execution. Our decision that, under these circumstances, the plaintiff is not entitled to the money so paid, I think agrees both with the justice of the case and the intention of the parties.

Attorneys for plaintiff: *Mackeson & Golding.*

Attorney for defendant: *C. W. Jackson, for Southall & Nelson, Birmingham.*

[IN THE EXCHEQUER CHAMBER.]

May 18.

LORD COLCHESTER AND OTHERS *v.* KEWNEY.

*Land Tax—Exemption—Hospital—Construction—*38 *Geo.* 3, *c.* 5, *s.* 25.

In 38 Geo. 3, c. 5, s. 25 (rendered perpetual by 38 Geo. 3, c. 60, s. 1) is contained an exemption from land tax of "any hospital" in respect of its site.

Commissioners appointed by the Crown to administer a fund subscribed by the public for that purpose, founded, in 1857, an asylum for the maintenance and education of three hundred daughters of soldiers, sailors, and marines, dying in active service. The asylum was built and maintained entirely out of that fund, and solely for the benefit of the children, and was under the control of the commissioners:—

Held, first, that the asylum was not within the exemption in the act, that exemption applying only to institutions and sites existing at the time when the tax was made perpetual.

Secondly, that it was not exempt as Crown property, such exemption depending not on the ownership but the occupation by the Crown.

ERROR on the judgment of the Court of Exchequer, on a special case, raising the question whether the site of the Royal Victoria Patriotic Asylum was liable to the payment of land tax. The Court below held that it was liable, and gave judgment for the defendant. (1)

Sir R. P. Collier, Q.C. (*Prideaux, Q.C.*, with him), for the plain-

(1) Reported Law Rep. 1 Ex. 368.

1867

LORD COLCHESTER v. KEWNEY.

tiffs, relied upon the arguments used, and the cases cited, by him below. In support of the first point, that the hospital was within the exemption in the act; he also urged that if the words of exemption did not apply to sites of hospitals becoming such after the passing of 38 Geo. 3, c. 60, the same rule must apply to the words of taxation in 38 Geo. 3, c. 5, s. 1, and it would follow that mines and quarries opened after the passing of the act would not be taxed; and further, that in the exemption clause itself (s. 25), the words relating to classes of persons, such as schoolmasters, &c., must necessarily be taken in the extended sense, which favoured a similar construction of the rest of the section. In support of the second point, that the hospital was exempt from taxation as Crown property, he relied upon the remarks of Bolland, B., and Parke, B., in *Attorney General* v. *Hill*. (1)

Mellish, Q.C. (*Philbrick* with him), for the defendant, relied upon the arguments used by him below; and, on the first point, further referred to 38 Geo. 3, c. 60, ss. 74, 104, 105, contending that as those sections, in making provision for the future arrangement of the land tax, contemplated the case of the exoneration of land by redemption, but did not contemplate the case of exoneration by the attaching of an exemption, it was to be assumed that no such future exemption was intended to take place. Upon the second point, he contended that the circumstance referred to in *Attorney General* v. *Hill* (2), as forming the ground of exemption, and that on which the decision proceeded, was not the ownership of the Crown, but its occupation of the land in question.

[SHEE, J., referred to the provision for redeeming the land tax on Crown lands, contained in 38 Geo. 3, c. 60, ss. 49, 50.]

Sir R. P. Collier, Q.C., in reply.

WILLES, J. We think the argument that the 38 Geo. 3, c. 60, established the existing land tax, as a perpetual charge on the land then subject thereto, ought to prevail, and that the judgment of the Court below must, therefore, be affirmed. At the time when that act passed, the 38 Geo. 3, c. 5, had already been enacted in the same year, forming one of a series of acts which from time to time imposed an annual land tax, and which made certain exemptions

(1) 2 M. & W. at p. 171. (2) 2 M. & W. at p. 165.

from it; and we may assume, for the purpose of this argument, that if the property, the liability of which to land tax is in contest, had, at the passing of the 38 Geo. 3, c. 5, been in its present state, it would have been exempted from liability.

The exemption is contained in s. 25 of the act, and is to the following effect [the learned judge read the words of s. 25]. The act, then, exempted all sites of hospitals, and it exempted also such of the revenues of certain institutions as they had enjoyed before 1693. But that act had only a temporary operation; it granted the land tax for one year, and exempted the favoured institutions as they then were. In these circumstances the 38 Geo. 3, c. 60, was passed, making the land tax then existing perpetual, and if the legislature had thought proper to make it perpetual, with a proviso that the future use of land for a purpose coming within any one of the categories of the 25th section should bring it within that exemption, it was competent to them to do so. Now, there is no express condition to that effect; but it is said that, connecting the two acts together, we are to infer that this was the intention, and to conclude that, although the site was charged for a year under 38 Geo. 3, c. 5, and charged in perpetuum under 38 Geo. 3, c. 60, yet when its use was changed to a purpose within the scope of s. 25, its liability ceased. Is this argument sustained by the language of the act, and by the ordinary rules of construction? We think not. The language of c. 60 is general and unqualified, and the intention of the act appears to have been, that the land tax then payable should so continue to be paid in respect of the land then charged. When it says that the land tax shall be perpetual, it means that it shall be perpetually payable out of the land then subject thereto; and so far as relates to the language of the statute alone, it is not necessary to go beyond the first section to shew the true construction to be that put upon it by the elaborate and lucid judgment of my Brother Channell, the conclusion of which we adopt. The recital of the preamble is, that "it may materially conduce to strengthening and supporting the public credit, and to augmenting the national resources at this important conjuncture, that the duty now payable for one year on land should be made perpetual, but subject to redemption and purchase." This is the

1867

LORD COLCHESTER v. KEWNEY.

key to the act, and it seems to indicate the construction that we adopt. It then enacts (s. 1) that "the several and respective sums of money charged by virtue of an act of the present session of parliament, &c., on the respective counties, &c., in Great Britain, in respect of the manors, messuages, lands, tenements, and hereditaments in the said act mentioned, lying within the same counties, &c., respectively, to be raised, levied, and paid unto his Majesty within the space of one year from the 25th of March, 1798, shall from and after the expiration of the said term (except as hereinafter mentioned) continue, and be raised, levied, and paid yearly to his Majesty, his heirs and successors, from and after the 25th of March in every year for ever; and that all the several powers, rules, directions, provisions, articles, clauses, matters, and things contained in the said act, &c., as far as the same are not varied or otherwise provided for in and by this act, shall continue and be in full force, and be duly observed, &c., as if the same powers, &c. were particularly repeated and re-enacted in the body of this act and expressly applied to the provisions thereof, subject nevertheless to the rules, regulations, restrictions, and conditions of redemption or purchase herein mentioned." The 2nd section then excepts from the operation of the statute the sums charged by the previous act upon personal property, salaries, &c.

Now we have before us the case of property not exempted when, either the former or the latter act passed, and we have words in the latter act making the existing liability perpetual. Unless, therefore, some special reason exists to the contrary, we must give the words their natural effect, and hold that the payment directed by the act to be made must include every portion of the land tax then payable, and that the land tax here distrained for is the representative of a part of the land tax so made permanent. Now the purpose and provisions of the statute are all in favour of general taxation, and not in favour of the particular exceptions. Not only is the tax perpetually imposed in terms, but it is to be presently dealt with as if leviable for ever. Thus, it is made the subject of purchase or transfer. That purchase is to be effected by transferring to the government a sum of consols sufficient to produce a revenue somewhat exceeding the annual

value of the land tax redeemed; with provisions for compensation out of the sum of consols originally paid, in the event of depreciation in the value of the tax. But there is no provision for the case of land, which, by changing its character and thus (as is contended) coming within the exception from the general taxation, might cease to produce anything. I will leave the argument on the statute with the remark, that its provisions rather tend to support the conclusion that no such extension of the exemption was intended as that now claimed. This branch of the subject is abundantly observed upon in the judgment of the Court below, and beyond indicating this conclusion it is unnecessary to follow out the argument farther.

But, the inference from other parts of the enactment thus supporting the natural meaning of the words of s. 1, various arguments were nevertheless urged on the part of the plaintiffs in error, to persuade us that this is not the true construction. It is said that on such a construction an absurdity will follow, for if c. 60 made perpetual the charge on lands then subject to it, so it also made perpetual the exemptions then existing. We were further told that there were certain provisions for the benefit of classes of persons which required this construction, and that a similar difficulty arose with respect to certain kinds of property not then existing. Thus, as to lands then used for the site of a hospital, the question was proposed, could it be said they should not be taxed when they ceased to be so used? As to the exempted persons, were only existing schoolmasters to be exempted, or was it not intended to include all schoolmasters? And as to mines and quarries which did not exist when the act was passed, were they to be free from the tax when they were afterwards opened? These, perhaps, were the most considerable of the arguments addressed to us on behalf of the plaintiffs; but they are without basis. First, as to the question of whether land used as a hospital at the time both acts were passed, but since (as in the case of St. Thomas's Hospital) diverted to another purpose, must in its new use be taxed, it does not now call for decision. When it arises, it will probably be said on the part of the public, insisting upon its liability, that the reason for the exemption ceasing the exemption itself ceases; that it applied only so long as the land

1867

LORD COLCHESTER v. KEWNEY.

continued to be used in the state in which it then was. On the other hand, it will be urged that the intention of the act was to treat hospitals and other exempted institutions as having redeemed the land tax, not only whilst they themselves used the land, but when they came to dispose of it. These would be the formulas which would have to be adopted as the expression of the two opposed views, but, whichever view the Court might adopt, it would not affect the present case, for it is obvious that no such considerations here arise. And I may add that no such question as that suggested, or as that we have to decide upon, could have arisen under the annual act containing the exemption, for it imposed the tax for the year on land in statu quo. Neither does that part of the exemption which relates to persons bear upon the question; because the act is here not dealing with individuals but with property, and provisions relating to classes of persons seem to have no application to a perpetually existing object of property, which may change its use. For, to the end of time, money will be made by teaching; the teachers may change, but the occupation, by which alone the class is ascertained, continues, and still produces money. But an end is put to this question by the statute taking away the tax in respect of personal property, salaries, &c. The last case was that of mines and quarries, as to which I will only say, that mines and quarries are nothing more than land and the potential profit of land in existence at the time the act was passed, and probably there will be no great difficulty in dealing with the case when it arises. The language, therefore, of c. 60 being general, and, indeed, universal in respect of the and tax then payable, and the general language of the first section not being modified in that or any other statute, we must say that the land tax is not taken away by reason of the change in the character of the land.

In conclusion, with respect to the claim of immunity on the ground that the hospital is Crown property, it could not at the time the act was passed have been considered as a thing required by usage and propriety that Crown property should not be taxed, merely because it was Crown property, and not on account of the occupation of the Crown, which is the true ground of exemption, seeing that sections 49, 50, contain express provisions for taxing

Crown land, and provide machinery for the redemption of the tax. The judgment of the Court below must be affirmed.

1867

LORD COLCHESTER v. KEWNEY.

BYLES, BLACKBURN, KEATING, SHEE, and MONTAGUE SMITH, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Sweeting & Lydall.*
Attorneys for defendant: *Batt & Son.*

[IN THE EXCHEQUER CHAMBER.]

May 18.

BARWICK *v.* ENGLISH JOINT STOCK BANK.

Principal and Agent—Representation—Money had and received.

A principal is liable to an action for the fraudulent misrepresentation of his agent, acting in the course of his business.

The plaintiff having for some time, on a guarantee of the defendants, supplied J. D., a customer of theirs, with oats on credit, for carrying out a government contract, refused to continue to do so unless he had a better guarantee. The defendants' manager thereupon gave him a written guarantee to the effect that the customer's cheque on the bank in plaintiff's favour, in payment for the oats supplied, should be paid, on receipt of the government money, in priority to any other payment, "except to this bank." J. D. was then indebted to the bank to the amount of 12,000*l.*, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff thereupon supplied the oats to the value of 1227*l.*; the government money, amounting to 2676*l.*, was received by J. D., and paid into the bank; but J. D.'s cheque for the price of oats drawn on the bank in favour of the plaintiff was dishonoured by the defendants, who claimed to retain the whole sum of 2676*l.* in payment of J. D.'s debt to them. The plaintiff having brought an action for false representation, and for money had and received:—

Held, first, that there was evidence to go to the jury that the manager knew and intended that the guarantee should be unavailing, and fraudulently concealed from the plaintiff the fact which would make it so.

Secondly, that the defendants would be liable for such fraud in their agent.

Thirdly, that the fraud was properly charged in the declaration as the fraud of the defendants.

Quære, whether the plaintiff could have recovered under the count for money had and received.

DECLARATION, 1st count, that, in consideration that the plaintiff would sell to or purchase for J. Davis & Son not exceeding 1000 quarters of oats for the use of their contract, the defendants pro-

1867

BARWICK v. ENGLISH JOINT STOCK BANK.

mised the plaintiff that they would honour the cheque of J. D. & Son in the plaintiff's favour in payment of the said goods, on receipt of the money from the commissariat in payment of the forage supplied for the then present month, in priority to any other payment except to the defendants' bank, provided that J. D. & Son were able to continue the contract, and were not made bankrupts; that the plaintiff, relying on the defendants' promise, and within a reasonable time, sold to and purchased for J. D. & Son, 1000 quarters of oats, to the amount 1227*l.*, under and according to the guarantee; that J. D. & Son made their cheque on the defendants in favour of the plaintiff in payment of the goods, and delivered it to the plaintiff; that the plaintiff did all things necessary to entitle him to have the cheque honoured; that the defendants received from the commissariat money in payment for the forage supplied by J. D. & Son for the said month, more than sufficient to pay the cheque, and out of which they could and ought to have honoured it; that all necessary conditions, &c., yet the defendant did not honour the cheque, nor have the said J. D. & Son nor the defendants paid the plaintiff the price of the said goods, or any part thereof, and the same remains due and unpaid to the plaintiff.

2nd count, for money had and received, and on accounts stated.

3rd count, that the defendants, by falsely and fraudulently representing to the plaintiff that J. D. & Son were not then indebted to them, induced the plaintiff to accept the guarantee in the first count mentioned, and to sell to and purchase for J. D. & Son 1000 quarters of oats on the faith of the said guarantee, and to take the cheque of J. D. & Son on the defendants in payment of the oats; averring that J. D. & Son were then, as the defendants well knew, indebted to the defendants in an amount greatly exceeding the cheque and any moneys then coming to the defendants on account of J. D. & Son, and out of which the cheque would otherwise have been payable: that by means of the premises the plaintiff was then deceived by defendants, and, believing their representations to be true, gave J. D. & Son credit for the said 1000 quarters of oats on the faith of the guarantee, and wholly lost the amount for which he so gave credit and the interest, and was otherwise injured.

Pleas—1, to the first count, denial of the promise; 2, to the

same, that the money received from the commissariat was not more than sufficient to pay what was due from J. D. & Son to the defendants' bank, wherefore, &c.; 3, to the second count, never indebted; 4, to the last count, not guilty.

Replication, joining issue on all the pleas, and to the second plea, on equitable grounds, that the money due to the defendants' bank was due before, and at the time of making the guarantee, whereof the defendants had notice, but the plaintiff had no notice, either at the time of accepting the guarantee, or of selling the oats, and that the defendants fraudulently concealed from the plaintiff the existence of the debt of J. D. & Son to the defendants, until after the selling of the oats, and represented to the plaintiff, and caused him to believe, that the only payments to be made to the defendants' bank out of the money to be received from the commissariat, would be payments of advances to be made by them after the guarantee, on account of the forage supply for the month; and that the sale and purchase by the plaintiff to and for J. D. & Son, was the means of enabling the defendants to receive the money from the commissariat, and but for that they would not have received the money, or any part thereof, as they at the time of making the guarantee well knew.

Rejoinder, joining issue on the second replication.

The cause was tried before Martin, B., at Westminster, on the 15th of June, 1866; and on the evidence given for the plaintiff, the substance of which is fully stated in the judgment of the Court, the learned Baron ruled that there was no evidence to go to the jury in support of the plaintiff's case, and accordingly directed a nonsuit, but signed a bill of exceptions setting out the evidence.

Feb. 8. *Brown, Q.C.* (*Huddleston, Q.C.*, and *Griffits*, with him), for the plaintiff, contended that his case rested on the ground on which in equity a second mortgagee has priority over a first mortgagee, whose negligence has enabled and induced him to advance money without knowledge of the first incumbrance. Story on Equity, s. 384, et seq.; *Mocatta* v. *Murgatroyd* (1); *Berrisford* v. *Milward* (2); a doctrine applied to the case of a guarantee in *Lee*

(1) 1 P. Wms. 393. (2) 2 Atk. 49.

1867

BARWICK v. ENGLISH JOINT STOCK BANK.

v. *Jones* (1), and open here to the plaintiff under his equitable replication; that as to the existence of an intention in the manager that the plaintiff should be induced by his representation to advance the money, which must be admitted to be an essential circumstance under the last count, there was ample evidence on which the jury might find it: *Swan* v. *North British Australasian Company*. (2)

He was stopped.

Mellish, Q.C. (*Watkin Williams* with him), for the defendants, contended that they clearly could not be liable on the guarantee declared upon in the first count, since they had satisfied its terms; that, further, there was no evidence of fraud, for that the transaction itself was abundant notice of the indebtedness of Davis; and it might be inferred from the guarantee itself, which was the termination and embodiment of the conversation, that there was knowledge or the means of knowledge in the plaintiff; that at least the want of knowledge in the plaintiff was owing to his negligence, since it was his business to inquire, and not the manager's voluntarily to disclose: *Hamilton* v. *Watson* (3); that even supposing there was a false representation by the agent, still the principal was not liable to an action: *Cornfoot* v. *Fowke* (4); *Udell* v. *Atherton* (5); *Wilde* v. *Gibson* (6); and that at least the fraud could not be stated as the fraud of the bank.

[WILLES, J. I should be sorry to have it supposed that *Cornfoot* v. *Fowke* (4) turned upon anything but a point of pleading. The learned judge referred to Com. Dig., Action on the Case for Deceit, B.]

Brown, Q.C., in reply, contended that in *Udell* v. *Atherton* (5) the general question of the liability of a principal for the acts of his agent, acting in the course of his agency, did not arise, but the decision turned on the facts of the case; and that *Hamilton* v. *Watson* (3) was no authority against the plaintiff when taken as

(1) 17 C. B. (N.S.) 482; 34 L. J. (C.P.) 131.

(2) 2 H. & C. 175; 32 L. J. (Ex.) 273: see per Cockburn, C.J. and Blackburn, J., 2 H. & C. at pp. 182, 188.

(3) 12 Cl. & F. 109.

(4) 6 M. & W. 358.

(5) 7 H. & N. 172; 30 L. J. (Ex.) 337: see the judgments of Martin and Bramwell, BB., 7 H. & N. at pp. 187, 193.

(6) 1 H. L. C. 605.

explained by Blackburn, J., in *Lee* v. *Jones* (1); the defendants were therefore liable on all the counts, and in particular as to the first, upon the ground that they were bound by way of estoppel by their agent's representation.

Cur. adv. vult.

May 18. The judgment of the Court (Willes, Blackburn, Keating, Mellor, Montague Smith, and Lush, JJ.) was delivered by

WILLES, J. This case, in which the Court took time to consider their judgment, arose on a bill of exceptions to the ruling of my Brother Martin at the trial that there was no evidence to go to the jury.

It was an action brought for an alleged fraud, which was described in the pleadings as being the fraud of the bank, but which the plaintiff alleged to have been committed by the manager of the bank in the course of conducting their business. At the trial, two witnesses were called, first, Barwick, the plaintiff, who proved that he had been in the habit of supplying oats to a customer of the bank of the name of Davis; and that he had done so upon a guarantee given to him by the bank, through their manager, the effect of which probably was, that the drafts of the plaintiff upon Davis were to be paid, subject to the debt of the bank. What were the precise terms of the guarantee did not appear, but it seems that the plaintiff became dissatisfied with it, and refused to supply more oats without getting a more satisfactory one; that he applied to the manager of the bank, and that after some conversation between them, a guarantee was given, which was in this form:—

"Dear Sir,—Referring to our conversation of this morning, I beg to repeat that if you sell to, or purchase for, J. Davis and Son not exceeding 1000 quarters of oats for the use of their contract, I will honour the cheque of Messrs. J. Davis and Son in your favour in payment of the same, on receipt of the money from the commissariat in payment of forage supplied for the present month, in priority to any other payment, except to this bank; and provided, as I explained to you, that they, J. Davis and Son, are able to continue their contract, and are not made bankrupts.

(Signed) "Don. M. Dewar, Manager."

(1) 17 C. B. (N.S.) at pp. 503, 504; 34 L. J. (C.P.) 131.

1867

BARWICK v. ENGLISH JOINT STOCK BANK.

The plaintiff stated that in the course of conversation as to the guarantee, the manager told him that whatever time he received the government cheque, the plaintiff should receive the money.

Now, that being the state of things upon the evidence of the plaintiff, it is obvious that there was a case on which the jury might conclude, if they thought proper, that the guarantee given by the manager was represented by him to be a guarantee which would probably, or might probably, be paid, and that the plaintiff took the guarantee, supposing that it was of some value, and that the cheque would probably, or might probably, be paid. But if the manager at the time, from his knowledge of the accounts, knew that it was improbable in a very high degree that it would be paid, and knew and intended that it should not be paid, and kept back from the plaintiff the fact which made the payment of it improbable to the extent of being as a matter of business impossible, the jury might well have thought (and it was a matter within their province to decide upon) that he had been guilty of a fraud upon the plaintiff.

Now, was there evidence that such knowledge was in the mind of the manager? The plaintiff had no knowledge of the state of the accounts, and the manager made no communication to him with respect to it. But the evidence of Davis was given for the purpose of supplying that part of the case; and he stated that, immediately before the guarantee had been given, he went to the manager, and told him it was impossible for him to go on unless he got further supplies, and that the government were buying in against him; to which the manager replied, that Davis must go and try his friends; on which Davis informed the manager that the plaintiff would go no further unless he had a further guarantee. Upon that the manager acted; and Davis added, "I owed the bank above 12,000*l*." The result was that oats were supplied by the plaintiff to Davis to the amount of 1227*l*., that Davis carried out his contract with the government, and that the commissariat paid him the sum of 2676*l*., which was paid by him into the bank. He thereupon handed a cheque to the plaintiff, who presented it to the bank, and without further explanation the cheque was refused.

This is the plain state of the facts; and it was contended on behalf of the bank that, inasmuch as the guarantee contains a

stipulation that the plaintiff's debt should be paid subsequent to the debt of the bank, which was to have priority, there was no fraud. We are unable to adopt that conclusion. I speak sparingly, because we desire not to anticipate the judgment which the constitutional tribunal, the jury, may pass. But they might, upon these facts, justly come to the conclusion, that the manager knew and intended that the guarantee should be unavailing; that he procured for his employers, the bank, the government cheque, by keeping back from the plaintiff the state of Davis's account, and that he intended to do so. If the jury took that view of the facts, they would conclude that there was such a fraud in the manager as the plaintiff complained of.

If there be fraud in the manager, then arises the question, whether it was such a fraud as the bank, his employers, would be answerable for. With respect to that, we conceive we are in no respect overruling the opinions of my Brothers Martin and Bramwell in *Udell* v. *Atherton* (1), the case most relied upon for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the Court of Exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business—a question which was settled as early as Lord Holt's time (2)—but in applying that principle to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business, as the manager of a bank is. But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. (3) That principle is acted upon every day in

(1) 7 H. & N. 172; 30 L. J. (Ex.) 337. (2) *Hern* v. *Nichols*, 1 Salk. 289.
(3) See *Laugher* v. *Pointer*, 5 B. & C. 547, at p. 554.

1867

BARWICK v. ENGLISH JOINT STOCK BANK.

running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo. (1) It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of bye laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye laws. (2) It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringment of a ferry, or such like wrong. (3) In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.

The only other point which was made, and it had at first a somewhat plausible aspect, was this:—It is said, if it be established that the bank are answerable for this fraud, it is the fraud of the manager, and ought not to have been described, as here, as the fraud of the bank. I need not go into the question whether it be necessary to resort to the count in case for fraud, or whether, under the circumstances, money having been actually procured for and paid into the bank, which ought to have got into the plaintiff's hands, the count for money had and received is not applicable to the case. I do not discuss that question, because in common law pleading no such difficulty as is here suggested is recognized. If a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is sought to be made answerable in the action. That was the decision in the case of *Raphael* v. *Goodman*. (4) The sheriff sued upon a bond; plea, that the bond was obtained

(1) *Ewbank* v. *Nutting*, 7 C. B. 797.

(2) *Goff* v. *Great Northern Railway Company*, 3 E. & E. 672; 30 L. J. (Q.B.) 148, explaining (at 3 E. & E. p. 683) *Roe* v. *Birkenhead Railway Company*, 7 Ex. 36; and see *Barry* v. *Midland Railway Company*, Ir. L. Rep. 1 C. L. 130.

(3) *Huzzey* v. *Field*, 2 C. M. & R. 432, at p. 440.

(4) 8 A. & E. 565.

1867

BARWICK v. ENGLISH JOINT STOCK BANK.

by the sheriff and others by fraud; proof, that it was obtained by the fraud of the officer; held, the plea was sufficiently proved.

Under these circumstances, without expressing any opinion as to what verdict ought to be arrived at by the jury, especially considering that the whole case may not have been before them, we think this is a matter proper for their determination, and there ought therefore to be a venire de novo.

Venire de novo.

Attorney for plaintiff: *J. H. Howard.*

Attorneys for defendants: *Lawrance, Plews, & Boyer.*

JESSEL *v.* BATH AND OTHERS.

April 29.

Bill of Lading—Written and Printed Words—Construction—Bills of Lading Act (18 & 19 *Vict. c.* 111), *s.* 3—*Ship's Agent or Consignee.*

The defendants were charterers of a steamship engaged in the Mediterranean trade, and had ship's agents or consignees at the ports of call. It is the custom for a ship's agent or consignee to sign bills of lading instead of the master, and no difference is recognised in trade usage between the efficacy of his signature and that of the master. The defendants' agents at Genoa signed a bill of lading for manganese, shipped in bulk and not weighed at the time of shipment, which described the manganese as of a certain weight, but contained in print the words, "weight, contents, and value unknown." The plaintiff was assignee for full value of this bill, and the whole of the manganese shipped was, on the arrival of the ship, delivered to him, but was found to be short of the weight stated in the bill. In an action brought by him to recover damages for non-delivery of the full weight:—

Held, first, that the printed words controlled the statement of weight.

Secondly, that the defendants were not bound by the signature of their agents to a bill of lading for a greater quantity than was actually shipped.

CASE stated without pleadings, and setting out the following facts:—

The plaintiff was assignee for full value, and bonâ fide holder, before the arrival of the ship, of a bill of lading for goods shipped on board the defendants' vessel; and he brought this action to recover damages for the non-delivery of 7 tons 12 cwt. of manganese, the residue of 33 tons 19 cwt. 1½ lb., stated in the bill of lading to have been shipped on board the defendants' ship *Meteor*.

1867

JESSEL v. BATH.

The defendants were charterers of the ship *Meteor*, which traded to Genoa and other Mediterranean ports. Their agents at Genoa were Messrs. Barchi Brothers. On the 12th of September, 1865, manganese in bulk was shipped on board the *Meteor* by Messrs. Viacava and Riga, to be carried to Swansea; and the defendants' agents signed a bill of lading to the following effect:—

"Shipped in good order and condition by *Messrs. Viacava & Riga* in and upon the steamship called the *Meteor*, &c., *thirty-four thousand four hundred and sixty kilogrammes mineral in bulk*, being marked and numbered as per margin, and to be delivered, &c., at the aforesaid port of *Swansea*, &c., unto *Mr. Richard Harris Vivian*, or to his or their assigns, freight and primage for the said goods, as per margin, to be paid by the *consignee*, &c."

"Dated in *Genoa*, 12 *September*, 1865.

"Weight, contents, and value unknown, and not answerable for leakage, breakage, or rust. The goods to be discharged, &c. The owners of this ship will not be accountable for gold, silver, bullion, specie, jewellery or precious stones, unless bills of lading are signed for such goods, and the value declared in the bills of lading.

"(Signed) *G. & E. Barchi Brothers, consignees.*"

The heading of the bill of lading was as follows:—

"Bristol Channel and Mediterranean,
"Henry Bath & Son,
"Swansea.

"Agents,
"Bristol, Messrs. Turner, Edwards, & Co.
"Genoa, Signor G. & E. Barchi Brothers.

(The names of agents at Leghorn, Naples and Palermo followed, and in the margin of the bill were the words):

Mineral in bulk, kilos.	34.460			
at 10.15 *kilos. the ton*	33	19	0	1½
Freight on 33*t.* 19*cwt.* 0*qr.* 1½*lb. at* 18*s.* per ton	£30	11	1	
15 per cent. primage	4	11	8	
Total	£35	2	9	

This bill of lading was in print, excepting the words above printed in italics, which were written, and the written words were in the handwriting of Viacava & Riga (the shippers) or their agents, except the signature by Barchi Brothers. The title "consignees," under which Barchi Brothers signed, is commonly used by foreigners in signing bills of lading as equivalent to "agents."

The whole quantity of manganese on board the ship when she arrived at Swansea was 26 tons 6 cwt., which was duly delivered to the plaintiff as assignee of the bill of lading; and it was admitted that the manganese so delivered was the whole that was shipped on board the *Meteor* at Genoa.

The manganese, which was shipped in bulk, was not weighed by the master of the *Meteor*, and neither the shippers, nor the plaintiff, nor the defendants, nor Messrs. Barchi their agents, nor the master of the *Meteor*, had notice that the weight was short until after the vessel arrived at Swansea.

Upon the position of ship's agents or consignees, the case stated that it is their duty to obtain cargo and generally to do what is necessary on behalf of the charterer; that since the introduction of steam navigation, steam vessels remain a much shorter time in port than was formerly the case with sailing vessels, whether the port be the terminus from which the voyage begins or merely a port of call; and it frequently happens that it would be impossible for the master during the time of his stay in port to sign the bills of lading applicable to the different shipments; and that a practice has in consequence grown up for the agent to sign bills of lading instead of the master; that no difference is recognised as any matter of trade usage or understanding between the efficacy of a signature by the agent and of a signature by the master; that the agent does not weigh the goods shipped, but takes the weight from the shipper. (1)

(1) In the case as originally drawn, it was stated that the bill of lading "was signed by their [the defendants'] agents, Messrs. Barchi, at Genoa, on their behalf." On the argument of the case in Michaelmas Term, it was contended by the plaintiff that these words expressed a general and absolute agency in Messrs. Barchi to sign bills of lading for the defendants; by the defendants that no such authority was implied by it, and that it expressed no greater authority than that of a master, who signs on behalf of himself and of the owners. The case was sent to an arbitrator on this point, and evidence was given before him, the effect of which was stated in the case as above mentioned.

1867

JESSEL v. BATH.

The question for the opinion of the Court was, whether, upon the facts stated, the defendants were liable to the plaintiff for the non-delivery of the residue?

Cole, Q.C. (*Bere* with him), for the plaintiff. First, the defendants will rely upon the words, "weight, contents, and value unknown;" but it is impossible to allow these words, which are merely in print, to contradict a distinct statement of weight inserted in writing, and carried out in the calculation of freight: *Gumm* v. *Tyrie* (1); *Robertson* v. *French*. (2) Similar words did not avail to protect the defendant in *Bradley* v. *Dunipace*. (3) Secondly, assuming the defendants not to be protected by these words, they are liable for the act of their agents abroad. A ship's agent is not in the same position as a master, and the cases which decide that a ship's owner or charterer is not liable on a bill of lading signed by the master for goods not put on board, are not applicable. The agent's functions are more extended, and he signs with the authority and in lieu of the owner or charterer himself. The defendants, therefore, who sign by their agent, are the persons signing within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111) s. 3.

Sir G. Honyman (*Anstie* with him), for the defendants. First, the defendants are protected by the words, "weight, contents, and value unknown." In *Bradley* v. *Dunipace* (3) the plaintiff recovered against the master, because it was considered that the weight mentioned in the bill specified the goods, and that there was a delivery of the wrong goods, and not merely of short weight. *Gumm* v. *Tyrie* (1) decided only that special provisions in writing override general printed statements which are inconsistent with them; but there is here no inconsistency, and *Hadow* v. *Parry* (4) is a direct authority in favour of the defendants. Secondly, even if this is not so, yet the defendants are not liable. This would be clear if the master had signed; for *Grant* v. *Norway* (5), following the dictum of Littledale, J., in *Berkley* v. *Watling* (6), shews that, at common law, the owner or charterer is not liable on a bill

(1) 6 B. & S. 298; 33 L. J. (Q.B.) 97.
(2) 4 East, 130.
(3) 1 H. & C. 521; 32 L. J. (Ex.) 22.
(4) 3 Taun. 303.
(5) 10 C. B. 665.
(6) 7 A. & E. 29, at p. 38.

signed by the master for goods never put on board; and *Hubbersty* v. *Ward* (1) settles the same with regard to a bill of lading for a greater weight than was shipped. The same principle was applied in *Coleman* v. *Riches* (2) to exonerate a wharfinger from liability for a statement made by his agent. The Bills of Lading Act has no application; for it only makes the bill of lading conclusive against the master or other person signing the same. But if the defendants are liable upon the signature of Messrs. Barchi as though they were "persons signing the same," it must be because Messrs. Barchi had a general and unlimited power to sign on their behalf. If so, there is no occasion to resort to the statute, and the defendants would be liable at common law. But it lies upon the plaintiff to prove such an agency, and the facts stated in the case do not support, but, on the contrary, negative the assumption, and shew that the function and powers of the agent or consignee are no greater or more extensive than those of a master, and that he signs, not in place of the owner or charterer, but of the master himself. The case of *Meyer* v. *Dresser* (3), by implication, negatives the plaintiff's contention, for it decides that the statute applies to the case of the master himself suing on the bill of lading, and that he could not claim to occupy the position of the owners on whose behalf he sued, but it would have been unnecessary to lay down the latter proposition if the statute had in fact applied to the owners.

KELLY, C.B. I think the defendants are entitled to judgment. It is clear upon the authorities cited that, but for the recent statute (18 & 19 Vict. c. 111), the defendants would not be liable; for a due delivery has been made of the whole of the manganese which was shipped at Genoa. But it is said that, under the act, the plaintiff, who is the bonâ fide holder for value of the bill of lading, is entitled to recover for the whole amount stated in it, independently of the quantity actually shipped. Looking at the bill of lading alone, it might be questionable whether, independently of the question on the statute, the defendants could be

(1) 8 Ex. 330; 22 L. J. (Ex.) 113.
(2) 16 C. B. 104; 24 L. J. (C.P.) 125.
(3) 16 C. B. (N.S.) 646; 33 L. J. (C.P.) 289.

1 Jur. N.S. 596.

1867

JESSEL v. BATH.

liable. For the written part of the bill is not entirely inconsistent with the printed. The whole may be reasonably and fairly read as meaning, that a quantity of manganese had been received on board, appearing to amount to thirty-three tons, but that the person signing the bill would not be liable for any deficiency, inasmuch as he had not in fact ascertained, and therefore did not know, the true weight.

But I do not rest my judgment on this ground. We are called upon for the first time to put a construction on this statute, and it is fit that we should state our opinion as to its effect with reference to the character of the party signing the bill of lading, where an action is brought against the owner or charterer. The preamble of the act recites that, "it frequently happens that the goods in respect of which bills of lading purport to be signed, have not been laden on board, and it is proper that such bills of lading in the hands of a bonâ fide holder for value should not be questioned by the master or other persons signing the same, on the ground of the goods not having been laden as aforesaid;" and in conformity with this language the enacting words of s. 3 are, that "every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped."

Now here the master certainly has not signed, but other persons, the Messrs. Barchi, have; are then the defendants within this second branch of the alternative? They cannot be so, unless Messrs. Barchi's signature is equivalent to their own,—that is, unless Messrs. Barchi have signed in their place.

Now the case states as follows. [His Lordship read the part of the case stating the position and duties of a consignee or agent.] In the first place, then, it appears that these gentlemen, the defendants' agents, have signed in conformity with a practice arising out of circumstances which would make it not merely inconvenient, but impossible, for the agents to weigh the goods, and that the weight is accordingly taken from the shipper. In the second place, it appears that, under such circumstances, the agent signs

"instead of the master," and that "no difference is recognised, as any matter of trade usage or understanding, between the efficacy of a signature by the agent and of a signature by the master." This amounts then to a statement that Messrs. Barchi signed instead of the master, and not instead of the defendants; and if this action had been against the master, the point raised by the plaintiff might have been material; but being neither against the master, nor against the person actually signing the bill of lading, it entirely fails. The defendants are, therefore, entitled to judgment.

MARTIN, B. I am of the same opinion, and my impression is that no one would be liable on this bill of lading in such an action as the present. The heading of the bill of lading is as follows. [The learned judge read the heading.] Now although only these four Mediterranean ports are mentioned, it is very well known that a regular trade is carried on by vessels trading to the Mediterranean, both to these and other ports, and that this course is usually followed: They go to Gibraltar, and spend a day there; then to the three Spanish ports of Barcelona, Alicante, and Malaga, stopping a day at each; then across to Genoa, where they stop a night, and then to Leghorn; from Leghorn to Civita Vecchia and Naples, and back again to Leghorn. That is a common well-known trade, and it is obvious that goods must be shipped on board hastily, and that goods shipped in bulk at a considerable distance from the shore, as is the case at Genoa, for instance, cannot by possibility be weighed. The person, therefore, signing the bill of lading, by signing for the amount with this qualification, "weight, contents, and value unknown," merely means to say that the weight is represented to him to be so much, but that he has himself no knowledge of the matter. The insertion of the weight in the margin, and the calculation of freight upon it, does not carry the matter any further; he calculates the freight, as it is his duty to do, upon the weight as stated to him. The qualification is perfectly reasonable; and I do not understand how a statement so qualified binds any one. My impression therefore is, that, even as against the consignees, this action would not succeed; clearly, however, it will not as against the defendants.

1867

JESSEL v. BATH.

BRAMWELL, B. I am of the same opinion, and for the same reasons. This document, though apparently contradictory, means this:—a certain quantity of manganese has been brought on board, which is said by the shipper for the purpose of freight to amount to so much, but I do not pretend or undertake to know whether or not that statement of weight is correct. On a bill of lading so made out I think no one could be liable in such an action as the present.

But another point has been raised, on which I think the Court ought to give judgment. At common law the defendants would not be liable on this bill, because, although Messrs. Barchi were their agents to conduct their business, they were not their agents to make an admission contrary to the fact, by signing a bill of lading for a quantity they knew nothing of. Then does the statute make any difference? I think not; it seems to me only to mean that the person actually signing the bill of lading shall be liable. If, for instance, an owner had signed, it would be conclusive against him, but it would not be so against the other owners. If then the bill of lading is only conclusive against the person actually signing, the defendants, not being the signers of the bill in question, are not made liable by the statute. They are, therefore, entitled to our judgment.

Judgment for the defendants.

Attorneys for plaintiff: *F. White & Sons, for H. Brittan & Son, Bristol.*

Attorneys for defendants: *Vizard & Co., for Brown & Davis, Swansea.*

[IN THE EXCHEQUER CHAMBER.]

1867
May 20.

TETLEY AND OTHERS *v.* WANLESS.

Debtor and Creditor—Deed under the Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Inequality—Scheduled Creditors—Release after Action—Pleading—Plea to further Maintenance.*

2 CP 582
1 QB D. 66

A deed under s. 192 of the Bankruptcy Act, 1861, between the debtor of the first part, J. D., a surety, of the second part, and the several persons, creditors of the debtor, whose names were thereunto subscribed, and all other the creditors of the debtor, of the third part, after reciting that the defendant was indebted "to the said several creditors in the several sums of money set opposite to their respective names in the schedule" thereunder written, and that it had been agreed by the requisite majority in number and value of the said several creditors to accept the composition and security therein expressed in full satisfaction of their respective debts, witnessed that in consideration of the joint and several promissory notes of the debtor and J. D. for the payment of such composition "on the respective sums of money aforesaid," they, the said creditors, parties thereto of the third part, released to the defendant all actions, suits, debts, claims, and demands, which they had against him, and accepted the stipulated composition in full satisfaction of the debts and sums due to them "specified in the schedule;" and the debtor and J. D. covenanted with each and every of the creditors parties thereto of the third part to pay the composition "upon their respective debts as aforesaid," and to make and deliver to them "the said promissory notes":—

Held, that there was no inequality in the deed, as on the true construction of it all the creditors, whether their debts were scheduled or not, were equally entitled to the benefit of the covenants therein contained.

To a declaration in debt by non-assenting creditors, the defendant (the debtor) pleaded the above deed, which had been entered into after the commencement of the suit, *generally* to the further maintenance of the action:—

Held, that the release contained in the deed discharged not only the debt sued for, but also all claims or demands arising therefrom by way of damages for its detention, costs, or otherwise, and that the plea was therefore rightly pleaded generally.

ERROR and appeal against a judgment of the Court of Exchequer discharging a rule to enter a verdict for the plaintiffs, or judgment non obstante veredicto. (1)

The declaration was on the common indebitatus counts. Plea to the further maintenance of the action, that after the accruing of the plaintiffs' claim, and after the 11th of October, 1861, and after the commencement of this suit, a deed bearing date the 7th of May, 1866, was entered into between the defendant of the

(1) Reported ante, p. 21, where the facts and pleadings are fully stated.

1867

TETLEY v. WANLESS.

first part, John Dobbing of the second part, and the several persons respectively creditors of the defendant, or the authorized agents of such creditors (not only those whose names and seals were thereunto subscribed and set, but also all other the creditors of the defendant), of the third part; and by the said deed, after reciting that the defendant was indebted to the said several creditors in the sums of money set opposite to their several and respective names in the schedule thereunder written, and that it was agreed by the requisite majority in number and value of the said several creditors to accept the composition and security therein expressed in full satisfaction of such respective debts, it was witnessed that in consideration of the joint and several promissory notes of the defendant and the said John Dobbing for the payment of such composition upon the respective sums of money aforesaid, they, the said creditors, parties thereto of the third part, for themselves and their heirs, &c., did, to the intent that those presents should be effectual and binding on all the creditors of the defendant, pursuant to the provisions of the Bankruptcy Act, 1861, thereby release unto the defendant, his heirs, &c., all actions, suits, debts, claims or demands, which the creditors of the defendant had or had had against the defendant, and did accept the stipulated composition in full satisfaction of the several debts and sums of money owing to them by the defendant, specified in the said schedule; and the defendant and the said John Dobbing thereby covenanted with each and every of the creditors, parties thereto of the third part, to pay the composition upon their respective debts as aforesaid, and to make and deliver to them the said promissory notes. Averments of performance of all conditions necessary to make the deed as binding on all the creditors of the defendant as if they had executed the same; that the plaintiffs were creditors of the defendant within the meaning of the deed, and of the Bankruptcy Act, 1861; that the claim sued for was a claim within the said deed, and by reason of the premises the defendant became and was entitled to plead the said deed in bar to the further maintenance of this action. Issue.

The action was commenced before the execution of the composition deed set forth in the plea, which, however, had in the first instance been pleaded in bar. No tender of the composition to

the plaintiffs was specifically alleged in the plea, and at the trial none was proved to have been made. Under these circumstances a verdict was entered for the defendant with leave to move to enter it for the plaintiffs, on the ground that the plea was a plea in bar, and was not proved; and secondly, that tender of the composition was put in issue by the replication, and was not proved. A rule was afterwards obtained in pursuance of the leave reserved, and also calling on the defendant to shew cause why judgment should not be entered for the plaintiffs non obstante veredicto, on the grounds, first, that the deed mentioned in the plea did not release the plaintiffs' debt, not being a scheduled debt; secondly, that the provisions of the deed were unequal, the giving of the notes being confined to scheduled debts; and thirdly, that the plea was bad for not averring a tender of the composition.

The Court of Exchequer, upon the argument of the rule, directed the plea to be amended by adding the words necessary to make it a plea to the further maintenance, and discharged the rule.

Kemplay, for the plaintiffs. First, the deed is unequal. It professes to be with all the creditors, but the recital contracts its operation to the scheduled creditors. They alone have the benefit of the covenant by the surety to pay the composition and deliver the promissory notes. The plaintiffs could not sue him if he should refuse to give them the composition or notes: *Buvelot* v. *Mills* (1); *Hickmott* v. *Simmonds*. (2)

[BLACKBURN, J. The first recital proves that the parties meant to have a complete schedule to the deed, including the name of every creditor. But does it control the construction of the deed?]

The language of the deed throughout is restrictive, and the release, though otherwise general in its terms, is limited to the debts "specified in the schedule."

[BLACKBURN, J. It will be difficult to maintain that this release is not general. It is given by the parties to the deed of the third part; that is, by all the creditors.]

[No further argument was offered on this point, nor was it con-

(1) Law Rep. 1 Q. B. 104. (2) Law Rep. 2 Eq. 462.

1867

TETLEY v. WANLESS.

tended that the release was conditional on a tender of the composition. This being so, the questions whether it was necessary specifically to allege tender in the plea, and whether, supposing it to have been sufficiently alleged, it was put in issue by the replication, did not arise.]

Secondly, the plea in its amended form was not proved. It should have been limited to the debt sued for: *Henry* v. *Earl* (1); *Goodwin* v. *Cremer*. (2)

[WILLES, J. Those were cases of a plea of payment. This is one of a release in general terms, applicable both to the debt and damages for the detention of the debt.]

The release cannot be an answer to the costs to which the plaintiffs were entitled up to the time of plea pleaded.

[WILLES, J. If the release applies to the debt and its accessories, how can the plaintiffs be entitled to any costs? It is necessary for you to argue that it does not apply to the damages for detaining the debt.]

The plaintiffs ought to be at liberty to sign judgment for nominal damages, which would carry costs. It is unjust that they should be deprived of them, and they have no other means of obtaining them. They cannot, under Rule 22, Trin. Term, 1853, confess the plea, and thus entitle themselves to the costs, because that rule does not apply to a case where a plea to the further maintenance is pleaded alone. *Kemp and Another* v. *Balls* (3); *Cook* v. *Hopewell* (4); and Rule 23, Trin. Term, 1853, does not apply, because it is limited to pleas *puis darrein continuance*, i.e. of matter arising since the last pleading.

Manisty, Q.C. (*Lewers* with him), for the defendant, was not called upon.

The judgment of the Court (Willes, Byles, Blackburn, Keating, Shee, and Montague Smith, JJ.) was delivered by

WILLES, J. We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed. Two points have been urged on us on behalf of the plaintiffs. The first is, that the deed pleaded is not within the Bankruptcy Act, 1861, s. 192, because it

(1) 8 M. & W. 228.
(2) 18 Q. B. 757.
(3) 10 Ex. 607.
(4) 11 Ex. 555.

is unequal. Now it purports to be between a debtor of the first part, a surety of the second part, and the several persons, creditors of the debtor, whose names were thereunto subscribed, and all other the creditors of the debtor of the third part. It then proceeds to recite—and to recite erroneously—that the debtor was indebted to the "said several creditors in the several sums of money set opposite their several and respective names," the schedule, in point of fact, not containing the names of all the creditors. Then follows a release in general terms by the parties to the deed of the third part of all actions, suits, debts, claims, and demands which they had or had had against the debtor. The deed also contains a covenant by the debtor and the surety to pay the stipulated composition to all the creditors "upon their respective debts as aforesaid." It is said that we ought to read this expression, and certain other similar expressions in the deed, as restrictive of the general description of creditors, given in the clause naming the parties to the deed, to creditors whose debts are specified in the schedule. If this contention prevailed, we should be placing a very narrow construction on the instrument. And further, we should be forgetting that a mere mistake—such as we can see this erroneous recital to be—ought rather to be rejected altogether than read as a restriction. If indeed the words *could* be read as a restriction in harmony with the rest of the deed, then they would doubtless have to be so read. But in this case they cannot be read as restrictive without destroying the effect of the deed. We are, therefore, of opinion that the interpretation placed upon the deed by the Court of Exchequer was the correct one.

With regard to the second point, we must take the plea in its amended form. We cannot, as was laid down in *Mellish* v. *Richardson* (1), inquire into the propriety of amendments made in the court below. Then it is argued that the plea in its amended form is not proved. The effect, we are told, of a release after action brought of a debt which is the cause of action is only to discharge the debt itself, subject to the creditor's right to go on with his action to obtain a judgment for nominal damages, to which judgment the law will annex costs. Now, the release here is "of all actions, suits, debts, claims, or demands;" and I may say it is

(1) 1 Cl. & Fin. 224.

1867

TETLEY v. WANLESS.

commendable in not adopting the voluminous phraseology common in releases. What, then, is the effect of releasing "all actions, suits, debts, claims, or demands?" If judgment had actually been obtained before the release was given, a technical point might possibly have been raised, that the terms of the release did not include executions. In Co. Litt. s. 507, we read, that "where a man recovereth debt or damages, and it is agreed betweene them that the plaintife shall not sue execution, then it behoveth that the plaintife make a release to him of all manner of executions." Whence it would seem to follow that a release of a debt or damages recovered ought in express language to include executions. But the next section (s. 508), states that a release of "all manner of demands is the best release to him to whom it is made that he can have, and shall enure most to his advantage." The form of release, therefore, adopted here being of all demands, is the most beneficial and the proper mode of releasing all descriptions of claim, even including executions.

This release, then, having been given, the action was gone, and of course the debt was gone also; but it is said something fresh to which the plaintiffs are entitled has sprung up. It seems to us that view of the case is reconcileable neither with common sense nor with the authorities. The point, indeed, was not expressly dealt with in the cases cited, though Lord Abinger's remarks in *Henry* v. *Earl* (1), which, as to the necessity of answering costs, do not appear satisfactory nor reconcileable with *Corbett* v. *Swinburne* (2), have a bearing upon it. Still that case, of *Henry* v. *Earl*, and all the other cases referred to, are not of release, but of *payment*, when the question has arisen, what the payment covered. It might turn out to be confined to the debt, and the damages for the detention for the debt would then remain to be sued for. Even in the case of payment, however, we agree with the opinion expressed by Maule, J., in *Beaumont* v. *Greathead* (3), that a payment in satisfaction and discharge of a debt is a payment in satisfaction and discharge of the nominal damages due for its detention. But no doubt an argument might arise as to whether the payment pleaded was made on account only, or in discharge of the debt and damages. That might be, as appears from *Goodwin* v.

(1) 8 M. & W. at p. 233. (2) 8 A. & E. 673. (3) 2 C. B. at p. 499.

Cremer (1), a question for the jury. It might appear that the payment was in satisfaction of everything, or of the debt only, and not of its accessories. Here, however, there is a release of actions, suits, debts, and demands, and such a release of a debt unquestionably releases all actions thereupon.

I wish to add a reference to the case of *Van Sandau* v. *Corsbie* (2), where a similar question to the present was discussed. A certificate in bankruptcy was in that case held to bar not only the original debt due from the bankrupt to his creditor, but also any right to damages accessory to and consequential upon that original debt; and the certificate was likened to a release of the debt and all demands arising therefrom. (3) Upon principle and authority, therefore, we think that this release stopped the action entirely, and was pleadable as a defence to the plaintiffs' whole claim. The plaintiffs could not go on with the action. If they had, and had obtained judgment for nominal damages, the release would have barred them, together with the costs. The judgment of the Court of Exchequer must accordingly be affirmed.

Judgment affirmed; and judgment for the defendant in error.

Attorney for plaintiffs: *R. Walthew, agent for Wood & Killick, Bradford.*

Attorneys for defendant: *T. M. & M. Howe, agent for Eglinton, Sunderland.*

(1) 18 Q. B. 757.

(2) 3 B. & A. 13.

(3) Per Parke arguendo, at p. 17, and per Best, J., at p. 20.

1867
May 20.

[IN THE EXCHEQUER CHAMBER.]

WOOD AND ANOTHER *v.* PRIESTNER.

Guarantee, Continuing—Future Debt—Construction.

The defendant's son being indebted to the plaintiffs for coals supplied on credit, and the plaintiffs refusing to continue to supply coals unless guaranteed, the defendant gave this guarantee: "In consideration of the credit given by the H. G. C. Co. to my son for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*, and in default of his payment of any accounts due, I bind myself by this note to pay to the H. G. C. Co. whatever may be owing to an amount not exceeding the sum of 100*l.*:"—*Held* (affirming the judgment of the Court below), a continuing guarantee.

APPEAL from the judgment of the Court of Exchequer, discharging a rule to enter a nonsuit. [Reported, ante, p. 66.]

H. Cowie, for the defendant. It appears from the circumstances of this case that when the guarantee was given, there was an account existing between the plaintiffs and the defendant's son, shewing a balance due from him to them, of 100*l.*, the exact sum guaranteed. This fact fortifies the natural construction of the instrument, which is, that it related to the then existing account. The expressions, "any accounts due," and "whatever may be owing," may be relied on as indicative of the defendant's intention to give a continuing guarantee. But they are capable of being explained by the circumstance that the defendant was ignorant of the mode in which the balance due from his son to the plaintiffs was made up. On the other hand, the words "credit given," "coals supplied," cannot be read, without violence, as applicable to future transactions. In *Allnutt* v. *Ashenden* (1) a guarantee very similar in form to this case was held not to extend to future supplies of goods. The ground of that decision was, that the words there, like the words here, in their *primary* meaning, referred to the past, and therefore could not be applied to the future by a reference to extrinsic circumstances: see per Bramwell, B., in *Broom* v. *Batchelor*. (2)

E. James, Q.C. (*Baylis* with him) for the plaintiffs, was not called on.

(1) 5 M. & G. 392. (2) 1 H. & N. 255; 25 L. J. (Ex.) 299.

1867

WOOD
v.
PRIESTNER.

The judgment of the Court (Willes, Byles, Blackburn, Keating, Shee, and Montague Smith, JJ.), was delivered by

WILLES, J. This case has been very clearly and ingeniously argued, but the argument addressed to us has not succeeded in raising any doubt in the mind of the Court. We are all of opinion that the decision of the Court of Exchequer was right. This guarantee was given in favour of the defendant's son, a person who had previously had a monthly credit given to him by the plaintiffs. He was desirous of having that credit given again, and accordingly obtained this guarantee. It commences with the words, "in consideration of the credit given by Messrs. the Hindley Green Coal Company to my son," and these words appear applicable to the same credit already given, *continued*. At the outset, then, the guarantee refers to a credit given and continued. Then, after stating that the defendant would hold himself responsible as a guarantee for a 100*l*., it proceeds thus: "in default of non-payment of any accounts due," an expression which might, it is true, be limited to any accounts then due, but which seems rather to refer to anything which might appear from time to time to be due on the current accounts between the parties. The guarantee then binds the defendant to pay "whatever may be owing," words which, again, might possibly be applied to whatever might be owing upon accounts between the parties being struck. They seem to us, however, to apply rather to a future state of things. Under these circumstances, the natural construction appears to be that the surety should be answerable for whatever might become due on the account to the amount of 100*l*. Notwithstanding, therefore, the argument for the defendant, to which we have listened with the attention which it deserved, the judgment of the Court of Exchequer must be affirmed.

Judgment affirmed.

Attorneys for plaintiffs: *Gregory & Co., agents for W. L. Welsh, Manchester.*

Attorneys for plaintiff: *Edwards, Layton, & Jaques, for J. Eltoft, Manchester.*

END OF EASTER TERM.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

TRINITY TERM, XXX VICTORIA.

1867
May 27.

WILLIAMS *v.* THE SIDMOUTH RAILWAY AND HARBOUR COMPANY.

Re WEBBER.

Sci. Fa.—Discretion of Court—Sci. Fa. on a Record erroneous on the face of it.

The Court will not refuse to issue a writ of sci. fa., to obtain execution on a judgment, on the ground that the judgment roll is erroneous on the face of it.

THE plaintiff in this case had obtained judgment against the defendants, a railway company, and subsequently a rule nisi calling on John Benjamin Webber, a shareholder in the company, to shew cause why a writ of sci. fa. should not issue against him as one of the shareholders in the company.

It appeared from the judgment roll that the plaintiff had sued in his own name as assignee of a Lloyd's bond given by the defendants to one Burgess and by him assigned to the plaintiff.

Barnard shewed cause. There is obvious error in this record.

It appears from it that the plaintiff was the assignee of a chose in action not assignable at law. Under these circumstances the Court will not direct the writ of sci. fa. to issue.

H. Matthews, and *J. B. Jacques*, in support of the rule, were not called upon.

KELLY, C.B. This rule must be made absolute. We must assume, in the absence of evidence to the contrary, that this judgment has been honestly obtained by a bonâ fide creditor of the company. That being so, he is entitled, if he cannot obtain satisfaction of his judgment otherwise, to issue execution against a shareholder individually; and his only means of doing so is by a writ of sci. fa. We really have not, under such circumstances, any discretion.

BRAMWELL, and MARTIN, BB., concurred.

Rule absolute.

Attorney for plaintiff: *K. H. Gough.*
Attorney for shareholder: *J. B. Sorrell.*

CHADWICK AND ANOTHER *v.* MARSDEN.

June 4.

Lease—Construction—Preservation of passage for "water and soil."

In a lease of certain premises with their appurtenances the lessor reserved out of the demise "the free running of water and soil coming from any other buildings and lands contiguous to the premises hereby demised in and through the sewers and watercourses made or to be made within, through, or under the said premises:"—

Held, first, that the reservation extended to water and soil coming from contiguous lands and buildings, whether that water or soil in the first instance actually arose on or from such contiguous lands or buildings or not; and secondly, that it did not extend beyond water in its natural condition, and such matters as are the product of the ordinary use of land for habitation, and that therefore it did not give to the occupier of certain tan-pits, who claimed under the lessor, a right of passage for the refuse of those pits.

DECLARATION. That the plaintiffs were the owners and occupiers of certain paper mills at Broughton, near Manchester, and the defendant was possessed of a tan-yard adjoining to the said paper mills of the plaintiffs, which said tan-yard was under the care of the defendant, who therein carried on his trade and business of a tanner; yet the defendant, not regarding his duty in

1867

CHADWICK v. MARSDEN.

that behalf, took such bad care of his said tan-yard, and of his tan-pits, and of the noxious and offensive matters therein respectively, that, by reason of the defendant's want of care thereof, divers large quantities of the refuse and other noxious and offensive matters in the said tan-pits and tan-yard respectively oozed and escaped therefrom, and percolated and ran into the said paper mills of the plaintiffs, whereby the said paper mills of the plaintiffs were greatly damaged, and became less fit than they otherwise would have been for the manufacture of paper therein respectively.

Pleas. 1. Not guilty. 2. That the grievances complained of were caused and occasioned solely by the acts, defaults, negligence, and improper conduct of the plaintiffs; to wit, by their wrongfully stopping up and destroying a certain drain, through which the defendant had theretofore been and still was entitled and accustomed to discharge the said refuse and other noxious and offensive matter into a certain stream near to the said premises of the plaintiffs. Issue.

The cause was tried before Montague Smith, J., at the Manchester winter assizes, 1866, when the following facts were proved:—

Lord Derby is the owner of certain land at Broughton, near Manchester, a portion of which in October, 1863, he leased for building purposes for 999 years to Mr. Hall Ashworth. The lease contained this reservation: "Except and reserved out of this demise the free running of water and soil coming from any other buildings and lands contiguous to the premises hereby demised, in and through the sewers and watercourses made or to be made within, through, or under the said premises." There was also a stipulation that the occupier should not carry on the trade of a tanner without the licence and consent in writing of the landlord. Mr. Ashworth having obtained the requisite licence, erected some tan-pits and a warehouse for hides, &c., and for a short time used the premises for the purposes of tanning. Before the making of these pits, there was an open channel running through his land, and communicating with a natural watercourse lower down the hill, on the slope of which the land lies, and during the few months of the tan-pits being used, the refuse from them was

drained into it. On its way to the watercourse it passes over an unleased portion of Lord Derby's land.

In 1864, Mr. Ashworth underlet to the plaintiffs a portion of his land, through and along which the watercourse flowed, and this underlease contained the same reservation as the original lease from Lord Derby. Subsequently, the remainder of the property was sold by auction to Mr. Barrow, of Manchester, by whom it was leased to the defendant as a tenant from year to year. The defendant, after entering on his tenancy, commenced using the warehouse and pits for the purpose of curing hides, and threw the refuse down the channel before mentioned, whence it should have escaped into the watercourse. Meanwhile, however, the plaintiffs had arched over so much of the watercourse and channel as passed through the land underlet to them, and had extended their premises across the stream; and it was found that the water and refuse thrown into the channel did not escape, but (owing to a stoppage in the pipes in which that channel terminated) accumulated against the wall of one of the plaintiffs' buildings, and presently oozed through and caused the damage complained of in this action.

The jury found that the pipe was, in point of fact, stopped, but whether by the plaintiffs' default or not, they did not say; and the learned judge, being of opinion that the defendant had not any right to drain his refuse from the tan-pits into the channel, a verdict was entered for the plaintiffs, with leave to move to enter it for the defendant, on the ground that, on the construction of the leases and the finding of the jury, the judge should have directed the verdict to be so entered.

A rule nisi was afterwards obtained in pursuance of the leave reserved, and also for a new trial, on the ground of misdirection, in this, that the question of negligence was not properly left to the jury.

Feb. 9. *Temple, Q.C.*, and *W. R. Cole*, shewed cause. The reservation in the lease from Lord Derby only applies to water in its natural condition, and not to foul water; nor can refuse from tan-pits come under the denomination of "soil." Again, nothing more is reserved than the free running of water and soil from "contiguous lands and buildings." But this tainted water and

1867

CHADWICK v. MARSDEN.

refuse do not come from the unleased land of Lord Derby "contiguous" to the plaintiffs' premises. They come across it, but they arise beyond it.

[BRAMWELL, B. Surely the clause has reference to all water, &c., which lawfully is upon the contiguous land, no matter how it came there?]

Assuming that to be so, the words cannot be held to extend beyond natural water and such "soil" as it has been usual to send down through the channel; it cannot include the refuse of a manufactory. It had never before been used, with the exception of a very short period, for such a purpose. With regard to the stoppage in the pipe, it does not appear whose default had caused it, and the defendant, therefore, has not made out a case of contributory negligence. [The point on misdirection was not pressed.]

Brett, Q.C., and *Pope*, in support of the rule. The complaint alleged in the declaration is, not that the defendant poured foul water down the drain but, that he sent too much water, and that it accumulated in such a manner as to injure the plaintiffs. The defendant in reply contends that he has a right to the "free running of water and soil," without restriction. Unless he was permitted to drain off the refuse of the tan-pits through this channel, the licence to trade as a tanner would be nugatory. Both the clause impowering Lord Derby's tenant, with a licence, to carry on such a trade, and the fact of the lease being a building lease, make it necessary to put the widest construction on the terms of the reservation. Again, the damage was caused by the plaintiffs themselves; they should have removed the stoppage in the pipe or channel, which, though not found to have arisen from their default, was on their premises, and immediately under their notice.

Cur. adv. vult.

June 4. The judgment of the Court (Bramwell and Channell, BB.) was delivered by

BRAMWELL, B. We think this rule should be discharged. The plaintiffs' case on the declaration and in proof was that the defendant sent certain waste and refuse from tan-pits down a watercourse, the outlet of which was a pipe through the plaintiffs' land;

that the pipe was stopped, the water accumulated, and damaged the plaintiffs. The defendant admitted this, but said he had a right to send the water and refuse down; and that, if the pipe was stopped, the plaintiffs, if they wished to avoid the accumulation of water, must themselves remove the stoppage. We agree in the latter part of the contention, and think the question is whether the right alleged by the defendant was proved by him. In fact, there was an old watercourse from his land over some unleased land of his lessor, Lord Derby, to the plaintiffs' land, and through it. For this watercourse the plaintiffs in their land had substituted a pipe. It is clear the defendant has the right to send all natural water down this course, and also all matters for which it has been used: *Pyer* v. *Carter.* (1) But it has not been used for tan-water and refuse, and therefore as to them the defendant must establish his right in some other way. He seeks to do so by shewing that Lord Derby, the plaintiffs' lessor, in the lease to them, reserved a right for the passage of water and soil, from the contiguous land over that leased to the plaintiffs, through watercourses and sewers. We think this would extend to all water and soil which lawfully was on the contiguous land, though it did not first arise there. But there are two objections to the defendant's case which we think fatal:—1st. It is not shewn that the defendant had any right as against Lord Derby to send this water and refuse on Lord Derby's adjoining land. 2nd. We think that this is not water or soil within the meaning of the reservation. We think these words mean water naturally falling or arising on, or elsewhere, and coming to, the contiguous land, and to such matters as are the product of the ordinary use of land for habitation, such as night-soil and sewage. We cannot think that under this word the landlord could use the contiguous land for any manufactory, and send the refuse, however offensive, through the plaintiffs' sewers and watercourses: much less can the defendant do so.

Rule discharged.

Attorneys for plaintiffs: *Dangerfield & Fraser, for Hall, Manchester.*

Attorneys for defendant: *Wilkins, Blyth, & Marsland, for Marsland & Addleshaw, Manchester.*

(1) 1 H. & N. 916: 26 L. J. (Ex.) 258.

1867
June 4.

ATTORNEY GENERAL *v.* DAKIN AND OTHERS.

Royal Residence—Privilege—Sheriff—Process—Hampton Court Palace.

Hampton Court Palace forms part of the royal demesnes of the Crown, and was formerly a royal residence, but has not been personally occupied by the sovereign since 10 Geo. 2. The state apartments are, and have been for many years past, used as a picture gallery; the pictures are the property of the Crown, but the public are admitted to view them gratuitously; the other apartments are occupied partly by officers of the palace, but principally by private persons, by the permission and at the pleasure of the Crown. The palace and grounds are maintained by the Crown, by its own officers and servants; a guard of honour is kept there, and service is performed in the Chapel Royal by a resident chaplain appointed by the Crown. The palace is under the control of a housekeeper appointed by the Crown, who has apartments in the palace.

A writ of fi. fa. having been executed in one of the suites of apartments occupied by private persons, and an information of intrusion having been filed against the sheriffs and their officers:—

Held per curiam, first, that the privilege of palace is attached to any place which is, in fact, the sovereign's residence; secondly, that actual personal residence at the time is not necessary to confer the privilege, if there be an intention to resume residence.

But *held* per Martin and Bramwell, BB., that in this case, the palace being so occupied that the Crown could not immediately resume occupation, such occupation of it was inconsistent with its being a royal residence, and that judgment should be for the defendants.

Per Kelly, C.B., that, considering that the palace was once a royal residence, its present use was not inconsistent with an intention in the Crown to resume residence, and that judgment should be for the Crown.

Affd in Ex Ch 3 Ex 268, in H/L 4 H/L 330

SPECIAL case stated pursuant to 22 & 23 Vict. c. 21, s. 10, on an information of intrusion filed by the Attorney General against the sheriffs of Middlesex and their officers, who had, on the 10th of February, 1865, executed a writ of fi. fa. in a suite of apartments in Hampton Court Palace, occupied by Lady Henry Gordon, the wife of the execution debtor.

The case stated the following facts: Hampton Court Palace has, from the time that it was presented to Henry VIII. in 1525 by Cardinal Wolsey, its builder, formed part of the royal demesnes of the Crown. It continued to be a place of occasional residence of the sovereign until the 10 Geo. 2, since which time no sovereign has personally occupied it.

A guard of honour is always on duty at the palace; sentinels

are posted at the various entrances, and those entrances are opened and closed at the pleasure of the Crown. Divine service is regularly performed in the Chapel Royal there by a chaplain appointed and paid by the Crown, who has apartments in the palace assigned for his residence. The sovereign has a pew in the chapel, which was a few years since used by the Prince of Wales when residing at the White Lodge, Richmond. On the demise of the sovereign or consort an achievement of the royal arms is affixed to the palace.

The palace and gardens are maintained by the Crown; the grapes grown in the vinery are used for the service of her Majesty's table; and the head gardener, commonly called the queen's gardener, and his three assistants, are appointed by the Lord Steward and paid out of the civil list in his department, and occupy official residences in the palace.

The palace contains a suite of rooms called state apartments, filled with pictures, the property of the Crown, and a room called the withdrawing-room, to all which the public are admitted under certain regulations; and for the last sixty years these apartments have not been used for any other purpose.

The housekeeper formerly employed servants to shew the pictures, and took fees for the view as a perquisite; but since the death of Lady Emily Montague, who held that office, the state apartments have been opened to the public gratuitously, under the superintendence of persons in the dress of police constables, appointed and paid by the Crown.

Other apartments in the palace are occupied by private persons; some of these consist of spacious rooms and offices, fit for the residence of persons with considerable household establishments, and are, and always have been, occupied by persons of rank and distinction; and others are occupied by persons of respectable station.

The officers now resident in the palace are, the master of the tennis court, who is paid partly from the second class of the civil list, and partly from the consolidated fund; the chaplain, who receives a salary from the privy purse, and obtains contributions from the occupants of the palace; and the housekeeper and head gardener, who are paid from the third class of the civil list, as settled by 1 Vict. c. 2, on her Majesty's accession.

With the exception of these persons, and some others similarly

1867

ATTORNEY GENERAL v. DAKIN.

situated, the suites of apartments occupied by private persons are not enjoyed by them as appurtenant or annexed to any office under the Crown, but by virtue of a written warrant from the Lord Chamberlain to the housekeeper, directing her to deliver to the named person the keys and possession of "the following lodgings in her Majesty's Palace of Hampton Court," "which lodgings are to be inhabited by ———, or some part of her ladyship's family, a part of every year, or they will be considered vacant, and disposed of accordingly; and when the family are absent it is expected that one of their servants shall be left in the lodgings, or that they will leave the keys thereof with you or the housekeeper for the time being," &c.

These suites of apartments are entirely furnished by their occupants. Before possession is taken such repairs as the officers of the Crown consider necessary are done at the expense of the Crown; occasionally, where the repairs desired for the accommodation of the occupier have required a considerable outlay, they have been done at the joint expense of the Crown and the occupier; but all alterations or additional works required by the occupier are done at their own expense, and these have in some instances amounted to more than 1000*l*. Afterwards the occupiers are bound to do at their own expense whatever is necessary for preserving the apartments in a proper and tenantable condition, or whatever they may consider essential to their convenience; but no works or repairs are done except under the direction of the officers of her Majesty's Office of Works, and the government contracting tradesmen are employed and paid by the occupiers. Surveys of the apartments were formerly made, and notices to repair given periodically, but are now made and given in each instance as circumstances appear to require.

Many of these apartments communicate with the state apartments, and the doors of communication are kept locked; but if in the general care of the palace the housekeeper finds it necessary to do so, she has the power of opening the doors, and passing through the apartments. Some of the apartments have exclusive outward entrances opening upon the public highroad and barge walk.

The number of families now occupying apartments is from sixty

to seventy. The apartments are occupied by the grace and favour, and during the pleasure, of her Majesty, who can at will remove the occupants.

The present is the first instance in which a fi. fa. has been executed, or attempted to be executed, within the palace. The defendants allege that writs of capias have been on several occasions executed within the palace, but they do not allege that the officers of the Crown knew of their execution; and the latter were not, in fact, till their attention was called to the seizure of Lord Henry Gordon's property, aware that any process of the superior courts had ever been executed within the palace without the previous permission of the Board of Green Cloth or the Lord Steward of her Majesty's Household. The defendants were unable to furnish the names of any parties arrested, or the dates when, or the particular parts of the palace where, any such arrests took place, the validity of such arrests not having been questioned, and no note therefore being taken of the matter. (1)

The question for the opinion of the Court was, whether the defendants were justified in executing the writ within the precincts of the Palace of Hampton Court?

May 10. *The Solicitor General* (*The Attorney General* and *McMahon* with him), appeared for the Crown; he cited *Reg.* v. *Ponsonby* (2); 2 Inst. p. 548, 549; 3 Inst. c. 45, p. 140; *Elderton's Case* (3); *Rex* v. *Stobbs* (4); *Winter* v. *Miles* (5); *Attorney General* v. *Donaldson* (6); *Strathmore* v. *Laing* (7); *Batson* v. *M'Lean* (8); and contended that actual residence of the sovereign was not necessary to confer the privilege.

Quain, Q.C. (*Day* with him), for the defendants, relied upon the same authorities, and cited Hawkins, P.C. vol. i. p. 61: he contended that the privilege was annexed to actual personal residence, that residence ceased when the acts of the sovereign indicated that there was no animus revertendi, and that such an indication was in

(1) The statements in the special case were mainly taken verbatim from *Reg.* v. *Ponsonby*, 3 Q. B. 14.

(2) 3 Q. B. 14.

(3) 3 Salk. 284; 6 Mod. 73; 2 Ld. Raym. 978.

(4) 3 T. R. 735.

(5) 10 East, 578.

(6) 10 M. & W. 117.

(7) 2 Wil. & Shaw, 1.

(8) 2 Chit. R. 51.

1867

ATTORNEY GENERAL v. DAKIN.

this case given when the state apartments were turned into a public picture gallery, and the rest of the palace into private residences.

The Solicitor General, in reply.

Cur. adv. vult.

June 4. The following judgments were delivered, in which the arguments on both sides are fully stated :—

BRAMWELL, B. The question in this case is, whether the defendants, the sheriffs of Middlesex, are liable to proceedings of intrusion at the suit of the Crown, for executing a fi. fa. directed to them, on the goods of a private person at Hampton Court Palace, which is within their bailiwick? I am of opinion that they are not. It is clear it is no objection to the execution of such a writ, that it is executed in land, or a house, in which the Crown has an estate of freehold, or otherwise. It is also clear that it may be executed in a house in the occupation of the sovereign; that is to say, supposing it was her Majesty's pleasure to have a farm, and to allow her bailiff or servant to live in a house on it, in such case, though the occupation of the servant would be the occupation of the mistress, no doubt the writ could be executed. It is also clear, that the fact of Hampton Court Palace being a palace, or called a palace, is unimportant; that is to say, if her Majesty were pleased to demise it for a term, though it would continue as much a palace (as far as the building and name go) as before, process could be executed in it. On the other hand, if the sovereign should hire a house for a term as a residence, and occupy it as such, there can be no doubt that process could not be executed in it during such residence.

These considerations shew that what is called the privilege is not the privilege of the building, but of the person. There is, with respect, an apparently slight, but not unimportant, inaccuracy in Lord Ellenborough's expression, "Being then such palace, the question is, when did it cease to be so, and become no longer entitled to *its* former privileges?" (1) It is the privilege or right of the sovereign that her *residence* should not be invaded for the purpose of executing process. The question then is, not whether Hampton Court is a palace, nor whether it is in the occupation of

(1) *Winter* v. *Miles*, 10 East, at p. 579.

the sovereign, nor whether she could reside there if she pleased; but whether it is her residence, that is to say, whether she does reside there, not at the very moment indeed, but either then or intending to return; because no doubt Buckingham Palace is the residence of her Majesty, although she may at the moment be at Windsor. I think it cannot be said that she does reside there. The question hardly seems to admit of argument, but to be one of fact, and a question of fact to be dealt with on no technical considerations. Who, speaking popularly, would say that the queen resided at Hampton Court? Her Majesty does not actually reside there, she neither sleeps nor takes her meals there, nor uses it for any personal purpose. On the contrary, she puts it to different uses, and could not reside in it herself without changing the use to which it is at present put. Some of the insignia or distinctions of a palace are kept up; there is a chaplain, and service in the chapel, and sentinels at the gates. But all these things might be where the queen had never resided.

The great point made on the part of the Crown is, that this was once a residence, and it is asked when did it cease to be so, and where is the line to be drawn? With submission, there is a great fallacy in this sort of argument. There may be a line, though I cannot say where; and the thing may have ceased, though I cannot say when. It is difficult to say when day ends and night begins, or to draw the line between them, yet day and night are not the same thing. As to the authorities, it is obvious that this being a question of fact, there can be no authority in point unless the facts are identical. At the same time, much help may be got from former cases. As to the case of Kensington Palace (1), it obviously differed from this. The king's furniture was in the palace, and one of the king's sons lived there. If the king had come into actual residence, he could not be said to have revoked any use to which the palace was put. The expressions in the judgment in that case are, in my opinion, favourable to the defendants in this. With respect to the Holyrood case (2), it must be remembered it was considered on appeal by the light thrown upon it by the actual residence of the king immediately

(1) *Winter* v. *Miles*, 10 East, 578.
(2) *Strathmore* v. *Laing*, 2 Wil. & Shaw, 1.

1867

ATTORNEY GENERAL v. DAKIN.

before that appeal. Further, it may be said the king must have a residence in Scotland, and that could only be at Holyrood. Still further, that palace had not been appropriated to other uses in the way this has been. *Reg.* v. *Ponsonby* (1) favours the plaintiff's contention. It is not necessary to protest one's desire to protect the queen's prerogative; but it seems to me, with great respect, that that prerogative is safer and more revered when it is not pushed to an unreasonable extent, as, I confess, I think it would be, if it were held to give some privilege to the bricks and stones of Hampton Court Palace to protect a debtor from the lawful process of his creditor.

MARTIN, B. I agree with my Brother Bramwell. I adopt the law as laid down by Lord Coke (2), Lord Holt (3), and the Court of Queen's Bench in *Winter* v. *Miles* (4); and I think that law is, that the queen's residence, or the queen's dwelling, is protected from the intrusion of the sheriff or any of his officers. Her own person and property are sacred and free of legal process; and it is but reasonable and right that persons living in her house, being there, and having property there, should in like manner be protected, in order to secure the sovereign from the intrusion of the sheriff's officers entering her dwelling to execute a writ. I think these three authorities establish that position, and that this protection ought to be given to the queen in the widest possible sense. It is not confined to the house or place where she actually happens to be living; but it is confined to what, in the common and ordinary understanding of mankind, is understood to be her residence and dwelling. It extends to Windsor and to Buckingham Palace; it extends to Osborne House; it would extend to Balmoral Castle if it were in England; it extends to every place at which the queen actually resided, or which is her dwelling or residence in the most enlarged sense. But when a place, though a royal palace, and formerly occupied by the royal family, has ceased entirely to be so occupied for a century, and there is no probability of the queen, in its present state, coming to reside there,

(1) 3 Q. B. 14.
(2) 3 Inst. c. 45, p. 140.
(3) *Elderton's Case*, 3 Salk. 284; 2 Ld. Raym. at p. 981.
(4) 10 East, 578.

1867

ATTORNEY GENERAL v. DAKIN.

in my judgment there is no privilege. It is a question of fact; and I am satisfied beyond all doubt that in no sense is Hampton Court Palace the residence or dwelling of the queen. She has thought fit to alter the nature and occupation of it; and instead of living there herself, she has been pleased of her bounty to appropriate it to the use of others by breaking it up, as the case states, into seventy different suites of apartments for different families. I do not think her so doing has the effect of enabling these persons to set their creditors and the law at defiance, and I am satisfied that her Majesty would be the last person in her kingdom to desire that such a state of things should exist. The judgment of Lord Ellenborough in *Winter* v. *Miles* (1), is satisfactory. The palace, in that instance, was Kensington Palace, where, at that time, the Duke of Sussex, the king's son, was living. The king's chamberlain had apartments there, and her furniture was in the house. Lord Ellenborough left the case to the jury as a matter of fact, and they found that this was a palace occupied by the king, which, in my judgment, was a right verdict. A rule was obtained for a new trial, on the ground that the jury had come to a wrong conclusion. In delivering judgment on that rule Lord Ellenborough states, apparently with approval, what Lord Holt had held, viz. that where there was a total absence of the royal family, "where the queen (Queen Anne) was neither present in person, nor by her domestics, or any of her family, the place was not privileged;" and he goes on himself to say, "It would be difficult to say that such a place would be entitled to the privileges of a royal palace; and much more so if the palace was so occupied by others as that his Majesty could not immediately return and reside there in his own person, if he were pleased to do so." (2) That is the test put by Lord Holt, and adopted by the Court of Queen's Bench.

It seems to me, therefore, that I am to ask myself—is the Palace of Hampton Court so occupied by others as that the queen could not immediately return and reside there in her own person, if she were pleased to do so? Now it is evident how it is occupied. There are state rooms, where pictures are shewn, and which are now open to the public by the favour of the queen; these apart-

(1) 10 East, at p. 579. (2) At p. 580.

1867

ATTORNEY GENERAL v. DAKIN.

ments are totally unfit for the queen's occupation, and it would be impossible for her to occupy them as her dwelling. If she were to occupy the palace, she would require to have the present occupants removed; they, in fact, really and substantially occupy it. As to the circumstances that there is a chapel, and that service is performed there, I do not attach any importance to them; the chaplain probably has some endowment and lives at the palace. The housekeeper has, indeed, a master-key, by means of which she can go through all the apartments; but how does that affect the real substantial circumstance that there are seventy sets of chambers or apartments in this palace, occupied by different families? Lord Ellenborough, at the conclusion of his judgment, says (1), "Had it, indeed, distinctly appeared in evidence, that the immediate personal residence of his Majesty was, by means of any occupation of the palace incompatible therewith, rendered impracticable, we might have formed a very different conclusion on the subject before us. And whenever a case so circumstanced shall occur, the Court will not feel itself bound by anything now laid down from directing a jury that the exemption in question ought in such a case to be disallowed." Now I think the statement in the case establishes that the immediate personal residence of the queen at Hampton Court is, by means of the occupation of the palace by others, rendered impracticable, and that therefore the privilege does not exist. I will only add that if the queen changed her mind, and chose to occupy Hampton Court as her residence, in my opinion the privilege would immediately attach, as it would attach on any other house in the kingdom which she thought fit to occupy. The law gives the privilege, if it be called a privilege—I should call it "legal right"—in the widest possible extent; but it seems to me it would not be fit and right to extend it to Hampton Court, where for upwards of one hundred years no member of the royal family has lived.

In my opinion, therefore, the judgment ought to be for the defendants.

KELLY, C.B. The single question in this case is, whether the Palace of Hampton Court has lost the privilege of the immunity

(1) At p. 582.

1867

ATTORNEY GENERAL v. DAKIN.

from the execution of civil process within it, by reason of the sovereign of England having ceased to reside there for a very considerable length of time, but without abandoning the possession, or control, or regulation of it as a royal palace, and still retaining the power to return to it and actually to reside in it, at the royal pleasure.

I am of opinion that this privilege still exists, and that every royal palace in which the sovereigns of this kingdom have once resided, and may come to reside again, and which is actually occupied, and kept up and maintained in a fit and proper condition, by the officers and servants and at the expense of the sovereign, is entitled to and retains this privilege, which attaches to the palace itself as long as it is the property and in the actual or constructive occupation of the sovereign. Personal and continuous residence is not necessary; it is enough that the sovereign, past or present, has resided there, and may come to reside there at a future period Such is the result of all the authorities. We find in the 3rd Inst. pp. 140-41, "The king's palace at Westminster hath this liberty and privilege, viz. nullæ citationes aut summonitiones liceant fieri cuicunque infrâ palatium Regis Westmonasteriense;" and that in the case of *Matilda de Nyerforde* v. *John Earl of Warren, and Johan de Barro Countess of Warren,* it was, upon full examination of the cause, adjudged in parliament in these words:—"Quod prædictum palacium domini regis est locus exemptus ab omni jurisdictione ordinariâ, tam regiæ dignitatis et coronæ suæ [ratione], quam libertatis ecclesiæ Westmonasteriensis, et maximè in præsentiâ ipsius domini regis tempore parliamenti sui ibidem: Ita quod nullus summonitiones, seu citationes, ibidem faciat." And Lord Coke proceeds thus: "Here two things are principally to be observed; first, that this royal privilege is not only appropriated to the palace of Westminster, but to all the king's palaces where his royal person resides; secondly, that this privilege is, to be exempted from all ecclesiastical jurisdiction,—regiæ dignitatis et coronæ suæ ratione." It is to be observed that the words of the resolution of the High Court of Parliament are at once clear and unconditional: "That the aforesaid palace of our lord the king is a place exempt from all ordinary jurisdiction." Here no residence at all is alluded to; and this is followed by the words "maximè in præ-

1867

ATTORNEY GENERAL v. DAKIN.

sentiâ ipsius domini regis tempore parliamenti sui ibidem." Lord Coke, indeed, after observing that this applies to all the king's palaces, certainly adds, "where his royal person resides." This, however, I think must be held to apply to a constructive as well as to an actual and personal residence, as appears by the case of Holyrood Palace, where there had been no actual residence for more than 150 years; and of Kensington Palace, where the sovereign had ceased to reside for a period of forty-six years.

Elderton's Case (1) is next to be considered. There it was resolved by Powell, Powys, and Gould, JJ., that the privilege of the Palace of Whitehall remained, though the queen (and this case occurred in the second year of the reign of Queen Anne) were not resident; and Holt, C.J., says (2), "If the court be kept there, though the queen's person be not present, it is a residence; but when the queen and the whole court and all the officers be removed, has it then the privilege of a palace?" And in the report in 3 Salk. 284, Lord Holt also says, that "where the queen was neither present in person, nor by her domestics, or any of her family, the place was not privileged." This decision, the first to be found after that of the Earl of Warren in the reign of Edward I., is a clear authority in favour of the Crown in this case of Hampton Court. It was held without qualification by three judges out of four, that the privilege continued although the queen was not resident; and the dictum of Lord Holt, that where the queen was not present in person, nor by her domestics, nor by any of her family, the place was not privileged, has obviously no application to the present case, in which the palace is in the present occupation of the queen by her officers and servants, who have an uncontrolled possession of the entire palace, with its outbuildings, gardens, and grounds, with the exception only of the apartments in which the queen has permitted certain favoured persons to reside, and to which her Majesty's housekeeper and servants have free access, and which apartments themselves her Majesty may re-enter and re-possess herself of at any moment when it may be her pleasure to do so.

We have next to consider the case of *Winter* v. *Miles* (3),

(1) 2 Ll. Raym. 978; 3 Salk. 284; 6 Mod. 73.

(2) At 2 Ld. Raym. p. 981.

(3) 10 East, 578.

where it was held by the Court of Queen's Bench, in 1809, that this privilege attached to the Royal Palace of Kensington. This had ceased to be a royal residence at the death of George II. Nearly half a century had therefore elapsed, and if the same question were to arise now, more than a century would have elapsed since any sovereign had actually resided in this palace. Yet it is clear that the privilege attached and still attaches to it, and continues unimpaired. Lord Ellenborough, in delivering judgment in that case, expresses himself thus (1): "Being then such palace, the question is, when did it cease to be so, and become no longer entitled to its former privileges?" If the same question be asked now as to the Palace of Hampton Court, how would it be answered? When did it cease to be a royal palace entitled to this privilege? It is indeed said in that case that there were certain state apartments reserved for his Majesty and his officers, and that the palace was kept up fit for his Majesty's reception if he should choose to visit it; and much reliance, in the argument, was placed upon that part of the case. But so here, a range of apartments exists, much more extensive than any which Kensington Palace contains, of which, if there be any occupier or occupation at all, her Majesty is in the sole and exclusive occupation, and which could be made ready for her Majesty's reception and personal residence there, as easily and expeditiously as any suite of apartments in Kensington Palace. So, it certainly appeared that the late Duke of Sussex, in 1809, occupied apartments in Kensington Palace. But surely it can make no difference whether a suite of apartments in which her Majesty is pleased to allow one of her subjects to reside, is occupied by a prince of the blood who has an income and an establishment provided for him by parliament, or by a nobleman or gentleman and his family, upon whom the queen may have been pleased to confer the same favour. Finally, it is urged that Lord Ellenborough observed, that if it had distinctly appeared that the immediate personal residence of the king was, "by means of any occupation of the palace incompatible therewith, rendered impracticable," a different conclusion might have been arrived at. But there is nothing upon this case as stated that tends to shew that personal residence of the queen

(1) At p. 579.

1867

ATTORNEY GENERAL v. DAKIN.

at Hampton Court is in any degree impracticable. The occupation of the residents in the various apartments of the palace might be determined at any moment; and even without disturbing any of its present occupants, the place might, and indeed may, be made the actual residence of the queen, or of some member of the royal family who may desire to reside there.

We have next the case of the Palace of Holyrood, as decided in *The Earl and Countess of Strathmore* v. *Laing*. (1) There it was held that the palace was privileged against the execution of civil process within it, although at the time when the question arose, in 1820, no sovereign of England or Scotland had ever entered it since the time of the Stuarts; and it had not been actually a royal residence since the union of the two crowns in the person of James I. Lord Gifford, in advising the House of Lords in that case, treated the law of England and Scotland as the same, and observed (2): "This privilege is given, not merely because otherwise the king might be deprived of the services of his domestics, but that it is not seemly that the royal palace or the royal presence should be exposed to be made a scene of disturbance and confusion." Then, after adverting to the case of Kensington Palace, in which it had also been held that actual residence was not necessary, and that the privilege continued, his lordship holds it "unquestionable that Holyrood House has not been abandoned as a royal palace by his Majesty, and that the actual presence of the king is not necessary to preserve the existence of the privilege."

The attention of the Court has also been called to the case of *Reg.* v. *Ponsonby* (3), in which the occupiers of apartments in this palace of Hampton Court were held rateable to the poor rate; but I am of opinion that the queen's prerogative cannot be impaired or affected by any liability which may be imposed by the poor laws upon a subject.

This privilege belongs to a royal palace, and is part and parcel of the royal prerogative, regiæ dignitatis et coronæ suæ ratione; and it is impossible not to see that executions, whether against the person or the property of a subject, executed in any place which is, or at any time might become, a royal residence, is calculated to offend the dignity and invade and disturb the personal comfort and

(1) 2 Wil. & Shaw, 1. (2) At p. 6. (3) 3 Q. B. 14.

privacy of the sovereign. It must of necessity, therefore, extend to every royal palace which has not been absolutely abandoned as a residence by the sovereign. Can it then become a question in the case of any royal palace whatever, whether it may or may not be the intention or pleasure of the sovereign to come and reside there in person? Lord Ellenborough justly observes (1): "The question of the discontinuance of any place as a palace of residence, which had at any time been so used by the sovereign upon the throne, might involve in its discussion many extremely delicate circumstances. It would not be a very seemly matter for inquiry, whether his Majesty had by any, and by what, manifestations of his royal will, indicated a purpose of not returning to any particular palace." May it not then be asked at the present moment—Who can tell, without entering upon this unseemly and unbecoming inquiry, how soon it may be her Majesty's pleasure to come and take up her residence, for a longer or a shorter period of time, actual and personal, within this Palace of Hampton Court? This question might have been asked in 1820 in the case of Holyrood Palace, which, after having ceased to be a royal residence for two centuries, was actually visited and occupied as the court of the king, two years afterwards, by George IV.

All the circumstances which constitute constructive occupation unite and concur in the present case, in shewing a continued legal possession on the part of her present Majesty. The large state apartments, the gallery, the withdrawing-room, the grand entrance, the royal chapel, the extensive outbuildings, the gardens, and the park, are all in the legal possession of her Majesty, and under the actual care, direction, and management of her Majesty's servants. A guard of honour and sentinels are stationed at various parts of the palace. The Chapel Royal is maintained, and divine service is performed there regularly by the royal chaplain, who lives within the palace, and the royal pew there has been occupied by the Prince of Wales. The palace in all respects possesses the character and appearance of a royal palace, and is in no other respect distinguishable from Windsor Castle, or St. James's, or Buckingham Palace, than that her Majesty does not at present personally reside there, and that certain suites of apartments in it are occupied by

(1) 10 East, at p. 581.

1867

ATTORNEY GENERAL v. DAKIN.

others under her Majesty's permission, but only during her Majesty's pleasure, which is indeed the case both at St. James's and at Kensington.

Under these circumstances, I am clearly of opinion that the immunity against the execution of civil process exists, that the entry of the defendants was an unlawful intrusion, and that the Crown is entitled to the judgment of the Court.

My learned brethren, being, however, of a contrary opinion, the judgment must be entered for the defendants.

Judgment for the defendants.

Attorney for the Crown: *Solicitor to the Board of Works.*
Attorneys for defendants: *Burchell & Hall.*

May 31.

MERCER *v.* PETERSON.

Bill of Sale—Agreement to give Bill—Fraudulent preference—Act of Bankruptcy—Bankrupt Law Consolidation Act, 1849 (12 & 13 *Vict. c.* 106), *s.* 67.

A trader, being indebted to the defendant, gave his acceptance to him for the amount of the debt. Three days before the acceptance was due, he agreed to give the defendant a bill of sale upon all his goods, chattels, and stock-in-trade, in consideration of the defendant taking up the acceptance, and in order to cover any further advance which might be made to him by the defendant. The defendant accordingly took up the acceptance, and afterwards lent an additional sum to the trader. A bill of sale was subsequently executed in pursuance of the agreement, whereby the whole of the trader's personal estate, of which he was then, or should in future, become possessed, was assigned to the defendant, as security for the debt due from the trader to him. Less than twelve months from the date of this bill of sale, but more than twelve months from the date of the agreement to give it, the trader was adjudicated bankrupt. In an action of trover by the assignee in bankruptcy against the defendant for the goods included in the bill of sale:—

Held, that the bill of sale conferred a good title to them on the defendant as against the plaintiff.

DECLARATION. 1st count, for the wrongful conversion by the defendant of the goods and chattels of one John Jones, before he became bankrupt; 2nd count, for the wrongful conversion of the goods and chattels of the plaintiff, as assignee of Jones; 3rd count,

for money payable by the defendant to the plaintiff, as such assignee, for money had and received.

Pleas to the 1st and 2nd counts, not guilty, and traverses of the possession of the goods in the 1st count mentioned, by Jones, and of those in the 2nd count mentioned, by the plaintiff. To the 3rd count, never indebted. Issue.

The cause was tried before Pigott, B., at the last Gloucestershire spring assizes, when a verdict was found, by consent, for the plaintiff for 115*l.*, with leave to move to enter a verdict for the defendant on admissions of fact, which were as follows:—

The plaintiff was creditors' assignee of John Jones, who was adjudicated bankrupt, on the plaintiff's petition, on the 31st of December, 1866. On the 25th of October, 1865, Jones was indebted to the defendant in the sum of 107*l.* 8*s.* 4*d.*, for goods sold and delivered, and money lent. Jones, on the same day, gave the defendant his acceptance for that amount, to become due on the 12th of December following. On the 9th of December, Jones applied to the defendant to advance him the money to take up the bill. The defendant refused to do so unless he would give an undertaking to execute a bill of sale, to secure the repayment of the amount. The following agreement was accordingly drawn out, and signed by Jones, and by the defendant:—

"Dec. 9, 1865. An agreement made between John Jones of the one part, and Thomas Peterson of the other part. The said Thomas Peterson having agreed to lend me 107*l.*, to pay my acceptance becoming due on the 12th of December instant, upon my agreeing to give him a security for the same upon my goods and chattels, and stock-in-trade, I hereby agree to give him a mortgage of the same accordingly, and for any further money he may lend me. (Signed) John Jones. Thomas Peterson."

Jones's acceptance had been previously left by the defendant with his bankers for collection, and was afterwards, when due, paid by the defendant with the money mentioned in the agreement as having been advanced to Jones. On the 6th of January, 1866, Jones applied to the defendant to advance, and the defendant did advance, 64*l.* 11*s.* 8*d.* upon the understanding that this should be included in the bill of sale. The bill of sale was given on the

1867

MERCER v. PETERSON.

27th of the same month, and after reciting the existence and total amount of the debt due from Jones to the defendant, and the agreement to secure it, together with any further moneys advanced in the manner thereafter mentioned, it was thereby witnessed that Jones assigned to the defendant the whole of his household goods, furniture, stock-in-trade, and effects then upon, or which should thereafter be upon, his premises, and also his book debts, and all other the personal estate to which he was then or should (so long as any moneys remained payable to the defendant) at any time thereafter be entitled. The bill of sale also contained a clause empowering the defendant, in case of default being made by Jones in the payment on demand of the money due, to seize and dispose of the goods and chattels included in it.

The debt at this time due from Jones to the defendant was 172*l.* and no further advance was made. At the time of the execution of the bill of sale (which was duly registered) Jones was a trader, and possessed of no property except such as was comprised in it. He was also at that time indebted to persons other than the defendant to the amount of about 300*l.*, the whole or greater part of which he was also liable to pay on the 9th of December, 1865.

On the 6th of February, 1866, the defendant demanded payment under the bill of sale. On the 10th of February, payment not having been made, he took possession of the goods mentioned in the bill, and sold all of them by auction, except goods to the value of about 90*l.*, seized by Jones's landlord for rent in arrear. A portion of the goods included in the bill worth 21*l.* had been acquired by Jones after the 9th of December, 1865.

After the seizure of Jones's goods by the defendant, Jones was left with no property whatever, and at the date of his bankruptcy returned in his balance-sheet, as the truth was, that he had no assets of any description. (1)

(1) The 12 & 13 Vict. c. 106, s. 67, enacts (inter alia) that if any trader liable to become bankrupt shall make any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or shall make any fraudulent gift, delivery, or transfer of any of his goods or chattels, with intent to defeat or delay his creditors, he shall be deemed thereby to have committed an act of bankruptcy. Sect. 88 enacts that no person shall be liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the filing of any petition for adjudication of bankruptcy against him.

1867

MERCER v. PETERSON.

In Easter Term last, *Cooke, Q.C.*, obtained a rule nisi on the above admissions, to enter the verdict for the defendant on the ground that the bill of sale was not fraudulent, or void, or an act of bankruptcy, or that, assuming it to be an act of bankruptcy, it must be taken to have happened at the date of the agreement, and therefore more than twelve months before adjudication.

Macnamara shewed cause. The bill, taken by itself, being a transfer of the whole of the debtor's property in consideration of a bygone debt, is clearly fraudulent and an act of bankruptcy, and the debtor was liable to become bankrupt upon it, as it was committed within twelve months of the petition for adjudication being filed. But then it is said that the bill is valid because it was made in pursuance of the agreement of the 9th of December, 1865, which was more than twelve months before the petition. Assuming that to be the case, the test of validity is this: would the bill of sale, if it had been given on the same day as the agreement, have been valid against the assignee? Griffiths and Holmes on Bankruptcy, vol. i. p. 122: *Hutton* v. *Cruttwell.* (1) It would not in this case, because the agreement was made in consideration of a past liability.

[MARTIN, B. There was an actual further advance after the date of the agreement, and before the date of the bill.]

That circumstance does not affect the question, unless there was in the agreement an *obligation* to make it. Here there was no such obligation, although the terms of the agreement contemplate the possibility of a future advance being made. The case is the same as if the whole debt were past. In Griffiths and Holmes on Bankruptcy, vol. i. p. 116, it is said that an assignment, by way of mortgage, is bad if the purpose be really to secure past advances, even though there may be an apparent intention to make further advances. In *Lindon* v. *Sharp* (2), further advances were actually made, after an assignment of all his property by a debtor, but as there was no *stipulation* in the assignment for making them, the assignment was held to be an act of bankruptcy. There is a material distinction between a *sale* for money and a mortgage for

(1) 1 E. & B. 15, 17 Jur. 392. (2) 6 M. & G. 895.

1867

MERCER v. PETERSON.

an advance: *Bittleston* v. *Cooke.* (1) The latter, to be valid, must be for the advantage of the general creditors. The advance must not be appropriated to the payment of one individual creditor: *Butcher* v. *Easto.* (2) In *Harris* v. *Rickett* (3), the assignment was *wholly* for a future advance, of which there was no reason to suppose the general body of creditors would fail to have the benefit; and in *Hutton* v. *Cruttwell* (4), the trader derived the full advantage of the whole sum advanced. But in *Graham* v. *Chapman* (5), a case similar to the present, an assignment of the debtor's stock, &c., including future acquired property, in consideration partly of a past debt, and partly of a present advance, was held to be an act of bankruptcy, because it necessarily tended to defeat and delay creditors. For these reasons the plaintiff is entitled to retain his verdict, but assuming the bill to be valid, it is only valid to the same extent as the agreement, and does not deprive the plaintiff of his right to future acquired property, which is found to be 21*l.* in value. In any event, therefore, he must retain his verdict for that amount.

Cooke, Q.C. (*J. O. Griffits* with him), in support of the rule, contended that the object of giving the bill was not to defeat or delay creditors, but to carry out the agreement of the 9th of December, 1865, which was really beneficial to them, as it probably prevented an immediate bankruptcy. The whole question turned on the intention of the trader: *Bills* v. *Smith.* (6) In this case he had given the bill in order to discharge an obligation to do so entered into by him, without any view of giving a preference to one creditor over another. In *Graham* v. *Chapman* (5), the inevitable consequence of the assignment was to defeat or delay creditors.

KELLY, C.B. I am of opinion that this rule should be made absolute. The first question for consideration is whether the giving of a bill of sale such as was given here, is an act of bankruptcy. Now, under the circumstances of the case, the bill must be taken as having been given and as being dated on the 9th of

(1) 6 E. & B. 296.
(2) 1 Doug. 294.
(3) 4 H. & N. 1; 28 L. J. (Ex.) 197.
(4) 1 E. & B. 15, 17 Jur. 392.
(5) 12 C. B. 85.
(6) 34 L. J. (Q.B.) 68, 11 Jur. N.S.

December, 1865. My Brother Martin refers me to an authority on this point in Messrs. Griffiths & Holmes' work on Bankruptcy, vol. i. p. 123, but really no authority is needed in support of the proposition that if there be, on a certain day, as, for instance, on the 9th of December, 1865, a bonâ fide agreement, founded on a good consideration, for the subsequent giving of a bill of sale, and if that bill be afterwards given accordingly, then, when thus given, it has a retrospective effect, and must be considered as having been made on the day on which the agreement was entered into. Regarding this bill of sale, therefore, as being dated on the 9th of December, 1865, there is an end of the question as to its being per se an act of bankruptcy, because it was given more than a year before the date of the adjudication.

The remaining question is whether we ought to say that this security is invalid or fraudulent as against the plaintiff. I do not think that we ought, for nothing can be clearer than that the transaction was an honest one, and, indeed, one which, at the time it was made, was beneficial to all the creditors. It is very probable that, if the debtor had not obtained the advance to meet this acceptance, he might have immediately become bankrupt instead of at the interval of twelve months. This agreement, therefore, appears to me to be good and valid, and founded on an honest consideration, that, namely, of what I regard as a present advance of money to the debtor. This being so, we must, in my opinion, uphold it, and make this rule absolute to enter a verdict for the defendant.

3 Ch 523

MARTIN, B. I am of the same opinion. In order to succeed, the plaintiff must establish that, within twelve months of the adjudication, an act of bankruptcy was committed. Within that period there must be shewn to have been a "fraudulent grant or conveyance with intent to defeat or delay creditors." I see nothing of the sort in this case. The truth is, that more than twelve months before adjudication the debtor entered into this agreement, and subsequently there was a further actual advance of money and the execution of the bill of sale. Now, in my judgment, by no possible construction can this transaction be made out to be a fraudulent grant of his goods by the debtor with intent to defeat

3 Ex 105

1867

MERCER v. PETERSON.

or delay his creditors within twelve months of the time when he was adjudicated bankrupt. The rule must, therefore, be made absolute.

CHANNELL, B. I am also of opinion that this rule should be made absolute. There is no ground for impugning the bona fides of the debtor, and at the time he entered into this agreement there was no intention on his part, or on the part of the defendant, to defeat or delay his creditors. On the contrary, the intention of both parties may well have been to keep the debtor afloat, and enable him to continue his business. If so, then there being no fraud in the conduct of the parties, the deed can only be void in consequence of its contravening the law of bankruptcy. Is the deed then void on that ground? In other words, is it an act of bankruptcy? I think it is not. Assuming for a moment that there was no earlier agreement, even then the bill of sale could only be an act of bankruptcy, because it was made within twelve months of adjudication. But we must not dissociate the bill from the agreement. Now, that agreement was for an advance, which we may take for the present purpose as equivalent to the value of the goods transferred. It does not appear to me to make any difference that the advance was intended to meet the acceptance about to fall due. It is said, indeed, that if it was so intended, if from the first it was fettered and controlled, the agreement would thereby be invalidated. But that would not, in my opinion, render it void, because the fact of the acceptance being provided for by the advance may have kept the bankrupt from immediate insolvency. It has been contended that we may separate the agreement from the bill of sale, because the latter is larger than the former. The bill, however, had direct reference to the agreement; and although it was to operate on further advances, still the agreement itself contemplated such further advances being made. The two things cannot be dissociated, and must be considered as forming part of the same transaction.

KELLY, C.B., in reply to *Macnamara*, stated that the Court did not think the plaintiff entitled to retain the verdict for 21*l.*, the value of property acquired after the date of the agreement. The

rule was to be made absolute generally, to enter a verdict for the defendant.

1867

MERCER v. PETERSON.

Rule absolute.

Attorney for plaintiff: *J. H. F. Lewis, for Wilkes, Gloucester.*

Attorneys for defendant: *Cree & Last, for Edmund Edmonds, Gloucester.*

STUBBS, ADMINISTRATOR *v.* THE HOLYWELL RAILWAY COMPANY.

June 4.

Contract for Personal Services—Effect of Death—Vested Right of Action.

Although a contract involving personal confidence is put an end to by the death of the party confided in, it is not thereby rescinded so as to take away a right of action already vested.

The defendants employed S. as consulting engineer for fifteen months to complete certain works. S. was to be paid 500*l.* for his services in equal quarterly instalments. Before the work was finished, and whilst two quarterly instalments which were due to him were still unpaid, he died:—

Held, that his personal representative was entitled to recover them.

DECLARATION for money payable by the defendants to the plaintiff as administrator of William Stubbs, deceased, for work done by the said William Stubbs, in his lifetime for the defendants, at their request, and fees, &c., payable in respect thereof, for money paid by the said William Stubbs in his lifetime for the defendants, at their request, and for money due on accounts stated between the said William Stubbs in his lifetime and the defendants, and for money due on accounts stated between the plaintiff as administrator and the defendants.

Pleas. Never indebted, and payment. Issue thereon.

The cause was tried before Mellor, J., at the last Liverpool spring assizes, when the following facts were proved:—

In December, 1865, William Stubbs, the deceased, was appointed consulting engineer by the defendants, to complete the construction of certain works on their line. The work was to be completed in fifteen months from the 5th December, and the defendants were to pay Stubbs 500*l.* as his fee or salary for performing it, by five equal quarterly instalments. He was also to be paid his travelling expenses. The work was commenced on these terms, and the first quarterly payment of 100*l.* was made in March, 1866. Stubbs

1867

STUBBS v. HOLYWELL RAILWAY CO.

continued in his employment for two quarters more. Soon after the end of the third quarter, and before any payment beyond the 100*l.* had been made to him, he died intestate. Less than three-fifths of the whole work had been done, but no default on the part of the deceased was proved. The plaintiff, his administrator, now sought to recover two instalments of 100*l.* each for the second and third quarters' work, and also 10*l.* for travelling expenses incurred by the deceased. The defendants contended, however, that they were only liable on a quantum meruit for the amount of work actually done during the second and third quarters. The jury found the actual value of the work done to be 150*l.* A verdict was entered for the plaintiff for 210*l.*, being the full amount claimed, viz. 200*l.* for the two quarterly instalments, and 10*l.* for travelling expenses. Leave was reserved to the defendants to reduce the damages to 160*l.*, on the ground that the death of Mr. Stubbs dissolved the contract, and that the contract being dissolved, the plaintiff was only entitled to recover on a quantum meruit for the work actually done.

A rule nisi having been obtained accordingly,

R. G. Williams shewed cause. This was a contract for personal services, and therefore was no doubt dissolved by death. But the death of Mr. Stubbs does not deprive his administrator of a right to recover what he himself, had he lived, could have recovered. At the time of his death he had a vested right of action for this 200*l.*, and his death cannot affect that right.

[CHANNELL, B. Actually earned commission is recoverable notwithstanding the death of the party who has earned it.]

The money here was actually earned by Mr. Stubbs. It was payable to him before his death. The case is similar to one in which freight on a cargo has been prepaid, when the party paying it cannot get it back though the cargo is lost on the voyage. The loss of the cargo in the one case, and the death of one of the parties in the other, are contingencies against which provision should be made expressly: *Carr* v. *Wallachian and Petroleum Company.* (1)

Holker, in support of the rule. This case is not analogous to those in which a servant is paid by time. But there was an entire

(1) Law Rep. 1 C. P. 636.

contract between the defendants and the deceased that they should pay him so much for a certain work; and for his convenience the amount was to be paid by instalments. The contract, however, being for personal services, was rescinded and put an end to by the death of Mr. Stubbs, and nothing can be recovered by his administrator under it. The defendants are liable to do no more than pay for the work actually done on a quantum meruit: Smith's Leading Cases, 6th ed. vol. ii. pp. 34—36. Suppose Mr. Stubbs had refused to continue to work at the end of the third quarter, he could not then have recovered the full amount of the previous instalments; and an incapacity to perform the residue of the work, caused by death, is equivalent to an absolute refusal to perform. The contract in either case must be treated as gone from the time of its originally being made: Smith's Leading Cases, 6th ed. vol. ii. p. 10, citing *Planché* v. *Colburn* (1), and *Withers* v. *Reynolds* (2), and what has already been done must not be treated as having been done under the contract. Death, like a refusal to perform, rescinds the contract *ab initio*. The plaintiff, therefore, cannot recover the whole amount claimed because that assumes the contract to be still in existence.

KELLY, C.B. I am of opinion that this rule should be discharged, and that the plaintiff is entitled to a verdict for 210*l*. He sues as the administrator of a person named Stubbs, who had in his lifetime entered into a contract to perform certain work for the defendants in fifteen months for 500*l*., payable under the contract in five quarterly instalments of 100*l*. each. The deceased, it appears, performed one quarter's work, and at the close of that quarter received 100*l*. in payment. He then performed his work during the second and third quarters, and at the expiration of the third quarter became entitled to two further instalments of 100*l*. each. These were due to him under the contract, and a right of action for them vested in him on the morning of the 6th of September, 1865. Soon afterwards he died, whilst these instalments remained unpaid. His death, no doubt, dissolved the contract. But it did not divest his representative of the right of action, which had already accrued to the deceased, and which sur-

(1) 8 Bing. 14. (2) 2 B. & Ad. 882.

1867

STUBBS v. HOLYWELL RAILWAY CO.

vived to that representative. Whether circumstances existed, or may be conceived to have existed, which would have enabled the defendants to maintain a cross action against Stubbs, or even against his administrator, is immaterial to the present question. Here is a perfect right of action vested in the deceased at the time of his death, which survives to the plaintiff. He is, therefore, entitled to recover, there being no plea alleging that the deceased did not perform his work, nor any proof of non-performance.

MARTIN, B. I am of the same opinion. The law on the subject is clear and free from doubt. Suppose a man enters into a contract to do a certain piece of work for a certain sum, then if he die before he completes it, he can recover nothing, not even if before his death he had done nine-tenths of it. For the contract was for the whole work, and not for nine-tenths of it. But suppose that the contract is for the performance of a certain piece of work for a certain sum, to be paid at the rate, say of 50*l.* a month, then the person employed earns 50*l.* at the end of each successive month. It is true that if, after doing a portion of the work, he refused to do the rest, he might not be able to recover, because he could not prove that he was ready and willing to perform his part of the contract. But such a case as the present has no analogy with that of a refusal by the person employed to continue performance. The contract, no doubt, is ended by the death of Stubbs, but only in this sense, that the act of God has made further performance impossible. The man's life was an implied condition of the contract, but the fact of his death can have nothing whatever to do with the payment due for what has been done—with what has been actually earned by the deceased. The contract had, it is true, an implied condition that he should live for fifteen months. But his death does not throw back his representative upon the right of recovering on a quantum meruit only. He can recover the stipulated price, due to the deceased when he died, of the work the deceased had actually executed. No vested right of action is taken away by death. The contract is at an end, but it is not "rescinded," for rescission is the act of two parties, not of one. With regard to the remarks quoted from Smith's Leading Cases, I may say, with the greatest respect for the learned author,

that some of the positions laid down by him in the note to *Cutter* v. *Powell*, in his leading cases, 6th ed. vol. ii. p. 1, are not, in my opinion, fully supported by the authorities.

CHANNELL, B. I am of the same opinion. It is not denied that this contract was one of personal confidence. That being so, on the death of Stubbs it was at an end, so far as the future was concerned. But although that be so, we are not to prevent what was done during his life, under the contract, from having its proper effect. This is not the case of a contract rescinded, but of a contract in its circumstances conditional on the life of one of the parties to it continuing for a certain period. On his death it became void. It became null for the future, but no more. The administrator might have it incumbent on him in some circumstances to shew that the deceased was ready and willing during his lifetime to continue performance of the contract, or else it might be said that no right of action had vested. But in this case there is no pretence for saying that the work was not actually done by the deceased. A right of action for the price agreed upon, therefore, vested in him, and I can see nothing to prevent the bringing of this action by his representative to enforce that right.

Rule discharged.

Attorneys for plaintiff: *Chester & Urquhart, for A. Wright, Liverpool.*

Attorneys for defendants: *Marshall, Westall, & Roberts, for Lace, Banner, & Co.*

1867
June 6.

WINTERBOTTOM *v.* LORD DERBY.

Public Way—Action for Obstruction—Special Damage—Dedication—Evidence of User—Practice as to entering Verdict on leave reserved.

4 QB 361
8 QB 99
8 CB 196
9 CB 405
10 CL 687
4 Ch D 550
6 Ch D. 453.
1 Applas 270

In order to maintain an action for obstructing a public way, the plaintiff must suffer some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way.

In an action for obstructing a public way, the plaintiff proved no damage peculiar to himself beyond being delayed on several occasions in passing along it, and being obliged, in common with every one else who attempted to use it, either to pursue his journey by a less direct road, or else to remove the obstruction:—

Held, that he was not entitled to maintain the action.

In order to prove that the way was in fact public, evidence was given of acts of user extending over nearly seventy years; but during the whole period the land crossed by the way had been on lease. The judge told the jury that they were at liberty, if they thought proper, to presume from these acts a dedication of the way to the public by the defendant or his ancestor, at a time anterior to the land being leased:—

Held, a proper direction.

Where leave is reserved by a judge at nisi prius to enter a nonsuit, the Court will, notwithstanding the leave reserved being thus restricted in point of form, order a verdict to be entered for the defendant on one issue without disturbing the verdict found for the plaintiff on another, if that course seems most consistent with doing justice between the parties.

Declaration. That the defendant on divers days wrongfully obstructed a certain public footway, in the township of Pilkington, in the parish of Prestwich, in the county of Lancaster, by placing upon and across the said footway, in divers places, posts, rails, and fences, whereby the plaintiff was on divers days hindered and prevented from passing and repassing over and along the said footway, and using the same, and was obliged to incur, and did incur, on divers days, great expense in and about removing the said obstructions, in order that he might, and before he could, pass and repass over and along the said footway, and use the same in and about his lawful business and affairs, and was greatly hindered and delayed in and about the same.

Pleas: 1. Not guilty; 2. Traverse that the footway was a public footway. Issue thereon.

The action was brought to try the right of the public to use a

1867

WINTER-BOTTOM v. LORD DERBY.

footway across some property belonging to the Earl of Derby, leading from a lane called Park Lane, in the township of Pilkington, to Prestwich, and thence to Manchester. At the trial before Mellor, J., at the last Manchester spring assizes, it was proved that the plaintiff, who resided near Manchester, had from time to time made use of the footway without any objection on the part of the defendant or his agent. About three years ago, however, the defendant's agent, who lived close to the land crossed by the footway, began to make great alterations, and erected some fences and other obstructions upon the way. He also ploughed over a portion of it, and in some parts almost obliterated it. The plaintiff, in spite of the path having thus become less convenient, continued to use it. On Sunday, the 6th of May, 1866, whilst he was approaching the Park Lane end of the path, with a view of passing along it, he met the defendant's agent, who informed him that there was no road that way. The plaintiff replied that there was one, which he had often used before, and intended to use on that day, and after making this observation, passed along the footway. On the 16th of August, 1866, he again, in company with some friends, went to Park Lane, with the intention of traversing the footway. He found it obstructed, and was delayed whilst some persons under his directions, and at his expense, removed the obstructions. On several subsequent occasions he renewed the attempt to use the path, but on each was either obliged to turn back, in consequence of obstructions being placed across it, or else was delayed whilst those obstructions were removed. He suffered no other damage beyond being thus forced, in common with all other persons attempting to use the path, either to retrace his steps and pursue his journey by another road, or else to remove the obstructions. The footway was the shortest and most convenient way from his house to Prestwich. He had been in the habit of using it either for the purpose of taking a walk, or of going to see friends at Prestwich, or otherwise for pleasure or profit.

In order to shew that the way was a public way, acts of user over it were proved, extending over nearly seventy years. But the land it crossed had, during the whole period, been on lease; and it was contended on behalf of the defendant that he, as reversioner,

1867

WINTER-BOTTOM v. LORD DERBY.

was therefore not bound by these acts, and that no dedication by him or his ancestors of the footway to the public could be presumed from them. But the learned judge told the jury that, from long continued user, going back indeed as far as living memory could go, they were at liberty, if they pleased, to infer a dedication of the footway to the public, by Lord Derby's ancestor, at a time antecedent to the land being on lease. The jury found a verdict for the plaintiff, and leave was reserved to the defendant to move to enter a nonsuit, on the ground that the plaintiff had not given sufficient evidence of damage to entitle him to maintain the action.

April 17. *Temple, Q.C.* (*Jones, Q.C.*, and *J. A. Russell*, with him), moved accordingly, and in arrest of judgment, on the ground that the declaration did not allege any sufficient cause of action; and also for a new trial, on the ground that the verdict was against the weight of the evidence, and of misdirection on the part of the learned judge in this, that he told the jury they might presume a dedication of the public footway against the defendant, the reversioner, from acts of user in the period during which the land had been on lease. In support of this last point he cited *Wood* v. *Veal* (1), where it was held that there could be no dedication of a way to the public by a tenant for ninety-nine years, without the consent of the owner of the fee, and that permission by the tenant would not bind the reversioner after the expiration of the term. In that case there had been user as far back as living memory went. He also cited *Baxter* v. *Taylor*. (2)

The Court (Kelly, C.B., Martin, Bramwell, and Pigott, BB.), without desiring to cast any doubt on the authorities cited, thought that there had been no misdirection, and on that point, therefore, refused the rule. On the remaining points they granted a rule.

June 1, 6. *James, Q.C.*, *Quain, Q.C.*, and *R. G. Williams*, shewed cause. The plaintiff suffered an inconvenience peculiar to himself. He resided in the neighbourhood of the path, and his most direct road to a place to which he had frequent occasion to

(1) 5 B. & A. 454. (2) 4 B. & Ad. 72.

1867

WINTER-BOTTOM v. LORD DERBY.

go, was along it. Then by the obstructions he was delayed, either whilst he had them removed, or by being forced to go a round-about way to his destination. He is thus damaged beyond the rest of the public.

[KELLY, C.B. But he is not damaged more than others of the public who may happen to pass along the way. The result of this argument would seem to be that every individual who attempted to pass along this path could bring an action.]

Every one actually obstructed, and who is driven either to go back or is delayed whilst removing the obstruction could maintain an action; and if it be said this would lead to a multiplicity of actions, the answer is, that the person causing the obstruction would have brought them on himself. An indictment for obstructing a highway is grounded on the *possibility*, and not the fact, of the public being prevented from using it; but any one who suffers, personally, positive inconvenience from the obstruction need not have recourse to an indictment. He can maintain his action for the personal injury he has sustained: Com. Dig. Action for Nuisance (C.) 294; *Meynell* v. *Saltmarsh* (1); *Hart* v. *Bassett* (2); *Iveson* v. *Moore* (3); *Rose* v. *Miles* (4), explaining *Hubert* v. *Groves* (5); *Rose* v. *Groves*. (6)

[CHANNELL, B. The principle laid down in *Iveson* v. *Moore* (3), and the other cases, is sound. The question is, as to the proper mode of applying it.]

That principle is, that *delay*, however caused, whether in removing the obstruction or going a less convenient way, is a cause of action: *Greasley* v. *Codling* (7); *Wiggins* v. *Boddington*. (8) In *Chichester* v. *Lethbridge* (9), the action was held to be maintainable on either of two grounds. First, because the defendant had offered personal opposition to the nuisance being abated; and secondly, because the plaintiff had been delayed; and Erle, C.J., is in error in stating in *Ricket* v. *Metropolitan Railway Company* (10) that the decision rested on the first ground only.

[CHANNELL, B. That ground seems the more intelligible. The

(1) 1 Keb. 847.
(2) Sir T. Jones, 156; 4 Vin. Abr. 519.
(3) 1 Ld. Raym. 486.
(4) 4 M. & S. 101.
(5) 1 Esp. 148.
(6) 5 M. & G. 613.
(7) 2 Bing. 263.
(8) 3 C. & P. 544.
(9) Willes, 71.
(10) 5 B. & S. 156, at p. 160; 34 L. J. (Q.B.) 257, at p. 259.

1867

WINTER-BOTTOM v. LORD DERBY.

plaintiff in that case was prevented from abating the nuisance, and was thus entitled to bring his action.]

The decision of Willes, C.J., rests distinctly on both grounds.

Temple, Q.C., *Jones, Q.C.*, and *J. A. Russell*, in support of the rule. All the cases cited are distinguishable. In all of those in which the action has been held maintainable the plaintiff has suffered a greater inconvenience than the rest of the public, who are obstructed in the exercise of their right; see per Erle, C.J., in *Ricket* v. *Metropolitan Railway Company*. (1) Thus, in *Hart* v. *Bassett* (2), the plaintiff was prevented from carrying home tithes. But in *Paine* v. *Partrich* (3), where the plaintiff's damage, as here, was a short delay, it was held that this injury, not being beyond that suffered by the public in general, was not actionable. The rule of law is accurately laid down by Lord Ellenborough, C.J., in *Rose* v. *Miles* (4), who says that the damage must be "something substantially more injurious" to the individual than to other people. In the present case the plaintiff neither proved nor alleged such substantial injury.

KELLY, C.B. The substantial point for our decision in this case is whether this action is maintainable. The rule of law on the subject, which is well laid down in the case of *Ricket* v. *Metropolitan Railway Company* (5), is, that in order to entitle a plaintiff to maintain an action, he must shew a particular damage suffered by himself over and above that suffered by all the Queen's subjects. I will refer to one or two authorities in support of this proposition. The leading case is that of *Iveson* v. *Moore* (6); and it is laid down there by Lord Holt that there must be a particular damage done to a particular person in order to found an action, otherwise there would be danger of a multiplicity of actions. It was observed, indeed, during the argument, that people must be careful not to violate the law, and if they do so, they must take the consequences. Observe, however, to what this argument may lead. It often, for some reason or other, becomes absolutely necessary to set up an

(1) 5 B. & S. at p. 159; 34 L. J. (Q.B.) at 259.

(2) Sir T. Jones, 156; 4 Vin. Abr. 519.

(3) Carth. 191.

(4) 4 M. & S. at p. 102.

(5) 5 B. & S. 156; 34 L. J. (Q.B.) 257.

(6) 1 Ld. Raym. 486.

obstruction in a highway. For example, commissioners of sewers, gas companies, or commissioners for draining, paving, or lighting may be obliged for a time to obstruct a highway. Now, suppose it were to turn out that there was some want of authority for the appointment of the commissioners, or some unintentional deviation from the statutory powers conferred on them, they would of course be liable to an indictment for wrongfully obstructing the highway. But if we were to hold that everybody who merely walked up to the obstruction, or who chose to incur some expenses in removing it, might bring his action on the case for being obstructed, there would really be no limit to the number of actions which might be brought.

Again, let us look further at the general nature of the cases where an action for obstruction has been held to be maintainable. In *Iveson* v. *Moore* (1), the plaintiff was the possessor of a colliery, and was obliged, in order to obtain the profits of his trade, to take laden carts and waggons, almost every day, along a certain highway. Then, by reason of that highway being obstructed, he personally sustained pecuniary damage. That was clearly special damage to the plaintiff alone. Once more, look at another case—a case which apparently makes most for the plaintiff—I refer to *Hart* v. *Bassett.* (2) There the plaintiff, a farmer of tithes, was prevented, by the defendant's obstruction, from carrying them home, and the obstruction must have been attended with considerable loss to the plaintiff. He had to take tithe, and he was liable to an action if he allowed the tithe to be injured on the ground, or if it was not taken within a reasonable time. The plaintiff, then, in that case, was obliged, in consequence of the obstruction, to spend extra money in the discharge of his lawful calling. That, therefore, was clearly a case where there was a peculiar pecuniary damage suffered personally by the plaintiff.

With regard to the cases cited for the other side, and to the law as to the cases where an action has been held to be not maintainable, it may, perhaps, be difficult to reconcile them. But it is impossible to look at the case of *Ricket* v. *Metropolitan Railway Company* (3), and at the observations in the judgments

(1) 1 Ld. Raym. 486. (2) Sir T. Jones, 156; 4 Vin. Abr. 519.
(3) 5 B. & S. 156; 34 L. J. (Q.B.) 257.

1867

WINTER-BOTTOM v. LORD DERBY.

of the learned law lords on it (1), without seeing that they thought the law had been too far extended in the direction of allowing this description of action to be brought. In this case, therefore, where there was no pecuniary damage—where the plaintiff merely, on one or more occasions, went up to the obstruction and returned, and on other occasions went and removed the obstruction—that is to say, where he suffered an inconvenience common to all who happened to pass that way—I think that to hold the action maintainable would be equivalent to saying it is impossible to imagine circumstances in which such an action could not be maintained.

Then there is the particular allegation in the declaration as to expense, stating that the plaintiff "was obliged to incur, and did incur on divers days, great expense in and about removing the said obstructions." That raises the question whether this sort of damage is recoverable. I think not, for if it were, anybody who desires to raise the question of the legality of an obstruction has only to go and remove it, and then bring his action for the expense of removing it. There would then be two modes open to everybody of trying whether the obstruction was lawful, namely, by indictment or by action. But if a person chose the latter way, and removes the obstruction, he only incurs an expense such as any one who might go to remove the obstruction would incur. The damage is in one sense special, but it is, in fact, common to all who might wish, by removing the obstruction, to raise the question of the right of the public to use the way. Upon the authorities, then, and especially relying on *Iveson* v. *Moore* (2) and *Ricket* v. *Metropolitan Railway Company* (3), I am of opinion that the true principle is, that he and he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade, or calling. A mere passer-by cannot do so, nor can a person who thinks fit to go and remove the obstruction. To say that they could, would really in effect be to say that any of the Queen's subjects could. We must therefore make the rule

(1) The judgment of the Court of Exchequer Chamber was affirmed in the House of Lords on the 16th of May last (see Weekly Notes, vol. ii. p. 157) and the judgments of the learned law lords had been handed to the Lord Chief Baron during the argument.

(2) 1 Ld. Raym. 486.

(3) 5 B. & S. 186; 34 L. J. (Q. B.) 257.

absolute to enter a verdict for the defendant on the plea of not guilty.

1867

WINTER-BOTTOM v. LORD DERBY.

MARTIN, B. I am of the same opinion. I do not think that damage of the sort proved here is sufficient to enable the plaintiff to maintain this action. I have, indeed, some doubt whether we ought not to arrest the judgment. But whatever course we take in point of form, I feel that we ought not to extend the rule which regulates the cases in which this description of action may be maintained.

CHANNELL, B. I am of opinion that the defendant is entitled to have a verdict on the plea of not guilty. The plaintiff cannot maintain this action without shewing that he has suffered damage beyond and in excess of what other people have suffered, and he has, in my judgment, failed to shew any such damage. But I do not think that we should arrest the judgment. The right course is, in my opinion, to enter a verdict for the defendant on the plea of not guilty. My reason for saying so is this:—an application to arrest judgment assumes that all the allegations in the declaration are proved, either because they have not been traversed, or because, if they have been, the issues raised on them have been found in favour of the party against whom the application is made. Therefore, though for convenience the two questions as to arresting judgment or entering a verdict are often argued together, a motion in arrest of judgment assumes that the verdict stands; and I am not prepared to say that, in that event, and assuming the truth of the declaration in toto, we should arrest the judgment. Then, again, I do not think we ought to enter a nonsuit. In point of form, leave was reserved to do so, and to do nothing else. But where a plaintiff has obtained a verdict on a material issue, it would not be just to enter a nonsuit, even though leave so to enter it was in form reserved. I think, however, that we ought to enter the verdict for the defendant on the first issue, just in the same manner as if the reservation had been to do that instead of to enter a nonsuit. The real meaning of reserving leave is to raise a point of law for the consideration of the Court, and they have to deal with the case as they think best in the interests of justice. Whether it is formally

1867

WINTER-BOTTOM v. LORD DERBY.

to enter a verdict or nonsuit, or to do only the one or the other, does not, in my judgment, make any difference in the power of the Court to deal with the case as they think best.

Rule absolute accordingly.

Attorneys for plaintiff: *Field, Roscoe, & Co., for Grundy & Coulson, Manchester.*

Attorneys for defendant: *Appleby, Wright, & Crowther, for S. & S. Woodcock, Bury.*

June 17.

THE BWLCH-Y-PLWM LEAD MINING COMPANY *v.* BAYNES.

Company—Action for Calls—Fraud—Repudiation.

2 H.L. 331
344
7 Ex. 27
10 C.B. N.S.
23 L.T.D. 424

To an action by a company against a shareholder for calls, the defendant pleaded that he was induced to become a shareholder by the fraud of the plaintiffs, that he had never recognised, since notice of the fraud, any rights or liabilities in him, as such shareholder, nor received any benefit from his shares, and that within a reasonable time after notice of the fraud he had repudiated the shares and given notice to the plaintiffs of his repudiation:—

Held, a good plea.

DECLARATION. That the plaintiffs are a company, registered and incorporated under the Joint Stock Companies Acts, 1856-57, and the defendant is a holder of 307 shares in the said company, and is, as such shareholder, indebted to the plaintiffs in 153*l.* 10*s.* for a call of 10*s.* on each of the said shares, which said call was duly made by the said company, under and according to the said acts, upon the defendant, as the holder of the said shares, in respect of moneys unpaid thereon; but the defendant has not paid the same.

Plea, that the defendant was induced to become the holder of the said shares by the fraud of the plaintiffs; and that he, the defendant, never, after he had notice of the said fraud, recognised any rights or liabilities in him, the defendant, as a shareholder, and has never received, and will not receive, any benefit whatever from the said shares; and within a reasonable time after he had notice of the said fraud, and before he had received any benefit

from or in respect of the said shares or any of them, he, the defendant, repudiated and disclaimed the said shares and all title thereto, and all liability in respect thereof, and gave notice of his repudiation and disclaimer thereof to the plaintiffs.

Demurrer and joinder.

Morgan Lloyd (*Coxon* with him), in support of the demurrer. The plea is bad, inasmuch as it admits the allegation in the declaration that the defendant is a shareholder. As long as he is so he cannot defend himself against an action for calls by a mere assertion of repudiation: *Henderson* v. *Royal British Bank*. (1) There should have been either an allegation that he is not on the register, or at least that he has taken all necessary steps to be struck off from it: *Venezuela Railway Company* v. *Kisch*. (2) If a creditor of the company were the plaintiff, the plea would afford no answer in equity, at all events: *Re Overend, Gurney, & Co.* (3); and the same rule should be applied when the company sues on behalf of the general body of shareholders. It should also have been averred that the defendant was an original allottee: *In re the Liverpool Borough Bank*. (4) If he was not, he cannot be said to have been induced to become a shareholder by the plaintiffs' fraud.

R. E. Turner, contrà. The question here is, what the rights of the plaintiffs and defendant are at common law, and the equitable right of creditors against shareholders have nothing to do with the matter. In *Henderson* v. *Royal British Bank* (1), the only case cited which was decided at law, the plaintiff was a creditor. In *Deposit Life Assurance Company* v. *Ayscough* (5), the defendant pleaded to an action for calls, a plea of fraud merely, and it was held that a repudiation of the shares ought to have been averred. In this case, accordingly, it has been averred. "Repudiation" is a term implying that the defendant has done all he can to free himself from liability. In *M'Creight* v. *Stevens* (6), a similar plea was pleaded without objection. With regard to the necessity of alleging the defendant to have been an original

(1) 7 E. & B. 356. 3 Jur. N.S. 111
(2) Law Rep. 2 H. L. 99.
(3) Law Rep. 3 Eq. 576. Affd 325.
(4) 26 Beav. 268; 28 L. J. (Ch.) 37. 4 Jur. N.S. 1068
(5) 6 E. & B. 761. 2 Jur. N.S. 812
(6) 1 H. & C. 454; 31 L. J. (Ex.) 455.

1867

BWLCH-Y-PLWM LEAD MINING CO. v. BAYNES.

allottee, it is not requisite. The plea shews sufficient to exonerate the defendant from his responsibility as a shareholder.

[BRAMWELL, B., referred to the decision of Willes, J., in *Glamorganshire Iron and Coal Company* v. *Irvine*. (1)]

Morgan Lloyd, in reply, contended that *Deposit Life Assurance Society* v. *Ayscough* (2) only decided that a particular allegation which had been omitted was necessary, and did not decide that it was the *only* allegation necessary to make the plea good. The plea was bad without it; but it did not follow that it would have been good with it.

Cur. adv. vult.

June 17. The judgment of the Court (Kelly, C.B., Martin and Bramwell, BB.) was delivered by

BRAMWELL, B. The question in this case, as Mr. Turner in his excellent argument said, arises in a common law action, in a common law court, and is to be decided on common law considerations. The plaintiffs' case is founded on contract. There is no duty on the defendant except what he has undertaken; whether he is an original allottee, or whether he is a transferree who has been accepted by the plaintiffs as a shareholder, the case is the same. If the defendant is liable it is because he has undertaken to fulfil the duties of a shareholder, in consideration of the plaintiffs giving to him the benefits of one. Now, it is a rule that a contract is voidable at the option of the person who has entered into it, if he has entered into it through the fraud of the other party, and has repudiated it on the discovery of the fraud. This includes giving up all benefit from it, and restoring the other party to the same condition as before, as far as possible. Now the plea alleges all these facts—fraud, prompt repudiation and restitution, as far as possible. It must be good, therefore, at common law, and so we hold. Cases in equity, under the Winding-up Acts, have been referred to. On them we pronounce no opinion, save that they do not govern this case. It may be this defendant is liable under the Winding-up Acts, or that he can otherwise be made, in equity, liable to creditors. No question of that sort arises here. There is no replication, legal or equitable, that the plaintiffs are suing as trus-

(1) 4 F. & F. 947. (2) 6 E. & B. 761.

1867

BWLCH-Y-PLWM LEAD MINING CO. v. BAYNES.

tees for creditors or any one else. There may be no creditor, and the action may be brought (we are far from saying it is) merely to indemnify those who have committed the fraud the defendant alleges. But we cannot help observing that creditors trust those who are *liable* as shareholders—those against whom the company is entitled to enforce the duty of shareholders. If the defendant had got on the registry through forgery of his name, he would not be liable, though as much trusted by creditors as now: see per Lord Justice Turner in *Ship's Case.* (1) But with this we have nothing to do. We have to decide a common law question. The authorities at common law are in the defendant's favour, and the ruling of Mr. Justice Willes, at Guildford, in *Glamorganshire Iron and Coal Company* v. *Irvine* (2), in 1866, is in point. Our judgment is for the defendant.

Judgment for the defendant.

Attorneys for plaintiffs: *M'Leod & Cann.*
Attorneys for defendant: *Miller & Smith.*

FOULGER *v.* NEWCOMB.

June 17.

Slander—Words spoken in respect of Business—Special Damage.

Spoken words imputing to a man misconduct in his office or trade are actionable, although the office or trade is not one of which the Court can take judicial notice.

The declaration alleged that it was the duty of the plaintiff, as a gamekeeper, not to kill foxes, that he was employed on the terms of his not doing so, and that a person killing foxes would not be employed as gamekeeper; that the defendant, knowing the premises, falsely and maliciously said of the plaintiff, as such gamekeeper, that he killed foxes; special damage:—

Held, on demurrer, a good declaration, even without the allegation of special damage.

DECLARATION. First count: that the plaintiff was a warrener, gamekeeper, horse-slaughterer, and grease manufacturer; that he carried on these businesses in the neighbourhood of Ridler's Wood; and that he was accustomed to be employed in his business of gamekeeper and warrener by occupiers of land in that neighbour-

(1) 2 De G. J. & S. 544. (2) 4 F. & F. 947.

1867

FOULGER v. NEWCOMB.

hood; that many of the persons who so employed him were accustomed to hunt foxes, and it was considered by them a very improper act to kill or destroy foxes in the neighbourhood; and a person who should be guilty of so killing and destroying foxes would be looked upon by them with disfavour and suspicion, and would not be employed by them; and the plaintiff was always employed as such warrener and gamekeeper upon the terms and understanding that he should not nor would kill foxes in the neighbourhood; that the plaintiff had been employed as such warrener and gamekeeper upon the terms aforesaid by one of the said occupiers, and had by reason of such employment to perform his calling in Ridler's Wood, but not to kill foxes there, and it would have been a gross breach of his duties as such warrener and gamekeeper, and in his said employment, had he killed foxes in the wood, of all which premises the defendant at the time &c. had notice; yet the defendant falsely and maliciously spoke and published of the plaintiff, and of him as such warrener and gamekeeper, and of his conduct whilst he was so employed, the words following: "It is no wonder we did not find any foxes in Ridler's Wood because Foulger trapped three foxes. I can prove it myself;" meaning thereby that the plaintiff, whilst he was so employed as aforesaid, in breach of his duty, killed and destroyed three foxes in the said wood; whereby the plaintiff has been greatly injured in his credit, reputation, and circumstances, and in his said occupations and businesses of a gamekeeper, warrener, horse-slaughterer, and grease manufacturer; alleging special damage from the refusal of divers of the said occupiers of land and others to employ him in the way of his said occupations and businesses.

Second count, repeating the allegations of the first count, except that it omitted the allegation as to plaintiff's employment by one of the occupiers, and the subsequent allegations, and in lieu thereof alleged that the defendant falsely and maliciously spoke and published of the plaintiff, and of him as such warrener and gamekeeper, and of his conduct whilst in those occupations, the words "Foulger trapped three foxes in Ridler's Wood," meaning that the plaintiff, whilst he was employed as such warrener and gamekeeper, wrongfully, unlawfully, and without the authority, leave, or licence of the occupier or person in possession of the

wood, or any other person, broke in, entered, and trespassed in the same, for the purpose of killing, and had killed, foxes there, contrary to the will of his employer and the terms of his employment, whereby the plaintiff has been and is damaged in the manner and to the extent in the first count mentioned.

Demurrer to both counts, and joinder.

Hance, in support of the demurrers, contended that the words were not actionable per se, since they only imputed to the plaintiff the killing of animals regarded by the law as vermin; and that they did not become actionable because the doing so was a breach of contract; that the special damage was not a natural result of the words, and was therefore too remote, even if the declaration had alleged knowledge in the defendant of the tastes and habits of those to whom the words were spoken, and knowledge by both of the terms of the alleged contract; but that this was so à fortiori when neither of these allegations was made; the alleged charge against the plaintiff of committing trespass gave no strength to the second count. He cited *Ayre* v. *Craven* (1); *Pembroke* v. *Colls* (2); *Kelly* v. *Partington*. (3)

O. Malley, Q.C. (*Metcalfe* with him), in support of the declaration contended that the words imputed to the plaintiff misconduct in his business, since it was alleged in the declaration that they were spoken of him in respect of his business; that it was not necessary that the business should be one of the duties of which the Court would take judicial notice; that at least the allegation of special damage made the declaration good; and that the statements in the declaration were sufficient to shew circumstances making the words defamatory, and (by charging malice) the defendant's knowledge of those circumstances.

Hance, in reply.

Cur. adv. vult.

June 17. The judgment of the Court (Kelly, C.B., Martin, Bramwell, and Channell, BB.), was delivered by

CHANNELL, B. These are demurrers to a declaration for slander containing two counts. The words complained of charge the plain-

(1) 2 Ad. & E. 2.

(2) 10 Q. B. 461.

(3) 5 B. & Ad. 645.

1867

FOULGER v. NEWCOMB.

tiff with trapping foxes. To say simply of a man that he trapped foxes would not, we think, be actionable. There are, however, various circumstances set out in this declaration, which it is asserted shew that there is a good cause of action.

The form of the declaration, and the somewhat peculiar circumstances of the case, gave rise to some little confusion on the argument of the case as to the principle on which an action for defamation is maintainable; and the apparent novelty of some of the points raised induced us to reserve our judgment. One essential ingredient of a good cause of action for defamation is damage. The rules as to the damage necessary to constitute a good cause of action, and as to the cases in which such damage is implied by law, are somewhat arbitrary; but the more important principles of them are now clearly defined. The two rules which we have to consider and apply to the facts of the present case are, first, that from spoken words which impute misconduct in an office, trade, profession, or business, the law implies actionable damage; secondly, that where words are spoken which are of a defamatory nature, yet such that the law will not imply damage from them, still they are actionable if they are shewn actually to cause (as their legal and natural consequence) damage of a character which the law will recognise. In order that the rule as to slander of a man in his business may apply, it is necessary that the words (being capable of having reference to the business) should in fact be spoken of him in respect of his business. This is alleged in the present case, and for the present purpose the allegation must be taken to be true. Next, it must appear that they tend to prejudice him in that business. This, as well as whether the words are capable of having reference to the business, must of course depend upon the nature of the business. Now, we think that the rule as to words spoken of a man in his office or trade is not necessarily confined to offices and trades, of the nature and duties of which the Court can take judicial notice. The only limitation of which we are aware is, that it does not apply to illegal callings; as, for instance, to the keeping open rooms for pugilistic encounters, as in *Hunt* v. *Bell* (1); see also *Morris* v. *Langdale* (2), a case relating to stock-jobbers, in which the decision proceeded on the ground that stock-jobbers

(1) 1 Bing. 1. (2) 2 B. & P. 284.

were at that time of two classes, one honest, the other practising what the legislature by the statute then in force called "the infamous practice of stock-jobbing;" and that there was not in the declaration any averment of which business the plaintiff carried on, or whether the contracts he was unable, or said to be unable, to carry out, were legal or illegal contracts. On the same principle, that words having a particular meaning in a particular trade, or a particular locality, may be explained by averment and innuendo in the declaration, we think that the nature and duties of the trade or business may be explained by averment in the declaration, so as to shew how the words spoken affect the business.

In the present case we could not, we think, take judicial notice that it could be the duty of a gamekeeper not to trap foxes, or that it would be a disparaging thing to say of him that he trapped foxes. It is, however, alleged, not only that the plaintiff was a gamekeeper, but that it was his duty as such gamekeeper not to kill foxes; that he was employed on the terms of his not doing so; and that the defendant knew all this.

So far, then, it is clear that, this being the true nature of the plaintiff's business and employment, to hear that he trapped foxes would prejudice him with respect to his business, at all events, with all persons who knew the real nature of his employment. It is not, however, quite clear that, where the nature of the business would not be generally understood, it might not be necessary to shew that the hearers were aware of the facts necessary to give the words their defamatory sense. Here the declaration does not appear to contain a distinct allegation that the hearers knew that the plaintiff's duty was not to kill foxes. It does set forth something as to what the people of the neighbourhood knew and thought, but it does not state that the slander was uttered to people of the neighbourhood. It does, however, contain an innuendo that the words imputed a breach of duty. We think that this may be taken to be equivalent to an allegation that the words would convey that meaning to the hearers, and, taking it with the rest of the declaration, we think it is sufficient to make the declaration good without special damage.

In *Ayre* v. *Craven* (1), the physician's case, which was the prin-

(1) 2 Ad. & E. 2.

1867

FOULGER v. NEWCOMB.

cipal authority relied on in support of the demurrers, the decision proceeded on the ground that the declaration did not set forth in what manner the misconduct was connected with the plaintiff's profession. Here the declaration does set forth that it was the duty of the plaintiff, in his employment, not to do that which the words complained of charged him with doing. Therefore the objection which was successful there does not arise here. On the whole, therefore, we think that the present declaration shews a good cause of action, independently of special damage.

It is, however, clearly shewn on the declaration that the words are capable of bearing a defamatory sense, viz. the imputing a breach of duty to the plaintiff, and it is alleged that the defendant, knowing the circumstances that made the words defamatory, falsely and maliciously used them in the defamatory sense. That being so, even if the law will not imply damage under the circumstances, still the words are actionable, and the defendant is responsible if they cause, as their legal and natural consequence, actual damage. Here actual pecuniary damage in the plaintiff's business or employment generally is alleged, and we think that this allegation at all events makes the declaration good. Of course if the plaintiff should only prove damage in the horse slaughtering or grease manufacturing departments of his trade, that would not help his case; but, as it is alleged in his business as a whole, we must take it that he means to prove damage in the other branch of his business, in which case it may well be the legal and natural consequence of the words.

There is a second count alleging that the words imputed a trespass as well as a breach of duty; this does not appear to differ substantially from the other.

We therefore hold both counts good.

Judgment for the plaintiff.

Attorneys for plaintiff: *Shirreff & Sons, for J. M. Pollard, Ipswich.*

Attorneys for defendant: *Doyle & Edwards.*

[IN THE EXCHEQUER CHAMBER.]

1867
June 22.

BUCKLE *v.* KNOOP AND ANOTHER.

Ship and Shipping—Charterparty—Construction ("delivered")—Freight, Mode of Calculating—Measurement at port of Shipment or Discharge—Increase of Bulk.

By a charterparty made between the plaintiff and the defendants, it was agreed that the plaintiff's ship should sail to Bombay and there load from the defendants a full cargo of cotton, and proceed with it to Liverpool and deliver the same on being paid freight at the rate of "75*s.* per ton of 50 cubic feet delivered." The ship received at Bombay, and carried to Liverpool, a full cargo of cotton; the cargo was packed at Bombay, as is customary, in compressed bales, and expanded greatly on being unloaded at Liverpool:—

Held (affirming the judgment of the Court below), that the freight was payable on the measurement of the goods when shipped, and not when delivered.

APPEAL from the judgment of the Court of Exchequer, discharging a rule obtained by the plaintiff to enter a verdict for him.

The Court held that under a charterparty, providing for payment of freight at "75*s.* per ton of 50 cubic feet, delivered for cotton or wool," the freight on cotton in pressed bales was to be calculated on the measurement of the cargo at the port of lading, and not at the port of discharge. [Reported ante, p. 125. (1)]

J. A. Russell (*James, Q.C.*, with him), for the plaintiff, urged the arguments that were used in the court below.

Potter (*Mellish, Q.C.*, with him), for the defendants, was not called upon.

BOVILL, C.J. In construing this charterparty we must look to the nature and character of the trade, and of the article contracted to be carried. The cargo is to be cotton, which is usually shipped in compressed bales; and it may be doubtful whether the shipowner would under an ordinary charterparty be bound to receive it in any other shape; he might probably say that he was entitled

(1) The plaintiff had also obtained a rule for a new trial, on the ground of misreception of evidence, which was also discharged by the Court below; but from this decision there was no appeal, the Court being unanimous, and no leave being given under 17 & 18 Vict. c. 125, s. 35.

1867

BUCKLE v. KNOOP.

to have his vessel filled in the usual manner. What, then, is a full cargo of such goods? Both parties are entitled to say that it is a full cargo of compressed bales, according to the capacity of the vessel. But if so, it seems to follow that the freight can be calculated only on that full cargo, so made up and carried. The plaintiff, however, contends that he is entitled to claim an additional freight of 140*l.* 7*s.*, beyond the actual carrying capacity of the ship. But this contention cannot succeed; the rule is correctly laid down in *Gibson* v. *Sturge* (1), by Alderson, B., that "the freight is to be calculated and paid on that amount only which is put on board, carried throughout the whole voyage, and delivered at the end to the merchant." There the increase in bulk happened during the voyage; here it happens after the cargo is taken out; but, in substance, the two cases cannot be distinguished, and the same principle applies to both. The only distinction indeed attempted, turned upon the insertion of the word "delivered" in this charterparty, and its absence from the charterparty in *Gibson* v. *Sturge* (2); but that affords no satisfactory principle of distinction, since the word may well have quite another purpose. Entirely concurring, therefore, in the judgment pronounced by the Court below, and thinking the interpretation they have put upon this charterparty the true one, I am of opinion that their judgment ought to be affirmed.

BLACKBURN, J. I am of the same opinion. The rule was correctly laid down in the case cited from the Court of Exchequer; what is a full cargo must be settled at the time of shipment, and the measurement must be according to the state of facts in which the cargo is then a full and complete one. It was rightly said by the Court of Exchequer in *Gibson* v. *Sturge* (2), that freight can only be claimed on what is shipped, carried, and delivered. If the parties for any reason choose to deviate from that rule, they may do so, and may make freight payable on the measurement of the cargo when unloaded, or on the cargo as shipped, and whether delivered or not, in which case though a portion is lost, freight is still payable on it. But if any such

(1) 10 Ex. 622, at p. 639; 24 L. J. (Ex.) 121.

(2) 10 Ex. 622; 24 L. J. (Ex.) 121.

variation from usage is intended, the parties should use apt words to express it; in the present case I do not believe it was intended, but it is certainly not expressed.

MELLOR, SHEE, and MONTAGUE SMITH, JJ., concurred.

Attorneys for plaintiff: *Clarke, Woodcock, & Ryland, for Taddy, Bristol.*

Attorneys for defendants: *Uptons, Johnson, & Upton, for Lowndes & Co., Liverpool.*

JONES *v.* HOLM.

June 22.

Ship and Shipping—Charterparty—Rescission—Construction—"Full and complete Cargo"—Fire—Different Voyage.

The defendant chartered a vessel to proceed to P., and there load "a full and complete cargo;" the charterparty contained the usual exception of "fire, &c." After part of the cargo was on board, and whilst a portion of the residue was lying alongside, the vessel caught fire; the fire was extinguished by scuttling the vessel, and the damaged cargo on board was necessarily sold by the master, who also forwarded by another vessel the portion then lying alongside. After the ship had been repaired, it was tendered to defendant's agents, but they refused to load any further cargo:—

Held, that the defendant was not exonerated from his obligation to load a full and complete cargo.

SPECIAL CASE stated without pleadings, in an action brought to recover damages for breach of the following charterparty:

On the 29th of January, 1866, a charterparty was made between the plaintiff, the owner of the barque *Edith Marion*, then at Liverpool, and the defendant, by which it was agreed that the vessel should proceed to Pernambuco, and there load from the defendant's factors, "a full and complete cargo of cotton in press-packed bales, with sufficient sugar in bags as ballast," and deliver the same at Liverpool at a certain freight per lb. for the cotton and per ton for the sugar, "restraint of princes and rulers, act of God, Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, during the said voyage always excepted."

The vessel arrived at Pernambuco on the 21st of March, and

1867

JONES v. HOLM.

was ready to take her homeward cargo on the 24th of May. On the 1st of June the charterer had loaded 2380 bags of sugar and 700 bales of cotton, and 118 bales were alongside in lighters for loading, when a fire broke out on board, and the vessel was scuttled by the master's orders. The master had at that time signed and delivered to the charterer bills of lading for the whole of the cargo already shipped and alongside, but that cargo did not amount to a full cargo.

The cargo on board was so far damaged that it was necessarily sold by the master by auction, under the advice of surveyors, and it realized 2586*l.*, which the master received.

The master forwarded the 118 bales alongside, by steamer to Liverpool, at a rate of freight higher than the chartered freight, and the cotton was received and the freight paid by the consignees.

The vessel was repaired with all despatch, and was on the 30th of July, and as soon as it could be, tendered to the charterer's agents at Pernambuco to take the remainder of the cargo. They refused to supply more cargo, and the vessel, failing to obtain a cargo at Pernambuco, ultimately obtained at Macao a cargo which she carried to England, at a less freight than she would have earned for a full and complete cargo under the charterparty.

The question for the Court was: whether, upon the facts stated, the defendant was bound to complete the loading of the ship.

June 17. *Mellish, Q.C.* (*Day* with him), for the plaintiff. It lies upon the defendant to shew something which has discharged him from his duty to load a full cargo. The origin of the fire being unknown, it cannot be assumed to be the fault of either party, but must be taken as an accident for which neither was responsible. Moreover, the shipowner is protected by the clause of exception in the charterparty: *Bruce* v. *Nicolopulo.* (1) But if so, the fire was clearly no reason for rescinding the contract. The case is the same as if the ship had been blown out to sea by a hurricane whilst loading, and had been obliged to repair; the necessary delay would not affect the contract. If, again, after all the cotton had been loaded, half the cargo had been burnt, clearly neither

(1) 11 Ex. 129; 24 L. J. (Ex.) 321.

party would have been excused. Neither would the plaintiff have been excused from carrying the residue, if the defendant had tendered it to him, in the present case. But if the contract subsisted to make one party liable, it must have equally bound the other. He cited *McAndrew* v. *Chapple*. (1)

Watkin Williams, for the defendant. It must be admitted that mere delay caused by the fire would not have excused the defendant from providing a cargo, but the circumstances under which it occurred do so. The defendant had already loaded a large portion of the cargo, and that, by the events which followed, the plaintiff was unable to carry; it is clear he could not be called upon to load this portion over again, but neither could he under his contract to load a full and complete cargo, be called upon to load the residue, which would be only a fragment of a cargo. Under the circumstances, therefore, the voyage for which the plaintiff required him to load was a different voyage from that stipulated for in the charterparty. But, further, even if this were not so, yet the plaintiff by forwarding a portion of the cargo in a different vessel, elected to treat the charterparty as at an end.

[CHANNELL, B. You must say that, as a matter of law, his doing so shewed a determination of the contract.

MARTIN, B. It is in truth an inference of fact, and I should rather draw the opposite conclusion.]

Mellish, Q.C., in reply.

Cur. adv. vult.

June 22. The Court delivered judgment.

BRAMWELL, B. In this case, which was argued before my Brothers Martin and Channell and myself, I am of opinion that the plaintiff is entitled to our judgment; and my Brother Martin wishes me to state that he agrees with me in that opinion. The first objection made by the defendant was that, in the circumstances under which the delay caused by this accident occurred, the voyage became a different voyage; that the original voyage was frustrated, and the case therefore within the rule which, in the case of such frustration, excuses the charterer from loading. I do not, however, think that the facts stated have this effect. Nothing

(1) Law Rep. 1 C. P. 643.

1867

JONES v. HOLM.

was said to shew that the two months lost made the voyage a different voyage from that agreed for. Neither do I think that the master's forwarding the remaining bales by another vessel shews any intention to treat the charterparty as at an end.

But another objection taken was that the obligation was to ship "a cargo;" that the plaintiff was to carry and deliver "a cargo;" and that that became impossible when the part first loaded was burned; it being admitted the defendant was not bound to load over again a quantity equal to the part burned. But an answer to this objection is found by a mere change of words—viz. by reading the charter as, to load "so many bales of cotton and so many bags of sugar as would make a complete cargo." Read in this way, the charter has not been fulfilled by the defendant in substance nor in words; he shews no justification for not having done so; and the plaintiff is entitled to judgment.

CHANNELL, B., concurred.

Judgment for the plaintiff.

Attorneys for plaintiff: *H. M. Rowell, for Pain, Newport.*
Attorneys for defendant: *Cotterills.*

June 12.

NIXON AND OTHERS *v.* THE ALBION MARINE INSURANCE COMPANY.

Special Case—Agreement to waive Stamp Objections—Practice—Striking out Case.

A case was stated for the opinion of the Court in which the question was whether the plaintiffs were entitled to recover from the defendants a sum due on an alleged contract of insurance. It appeared that no stamped policy had been issued, and that the covering note or memorandum of insurance was also unstamped. For the purposes of the case, however, the parties agreed that a valid policy should be deemed to have been executed in the defendants' ordinary form, in accordance with the covering note.

The Court ordered the case to be struck out, on the ground that they could not hear it without sanctioning what amounted to an evasion of the stamp laws.

THIS was a special case, in which the question for the opinion of the Court was, whether, under the circumstances detailed in the case, a certain sum of money could be recovered by the

plaintiffs "upon a contract of insurance alleged by the plaintiffs to have been entered into by the defendants."

It appeared from the case that no stamped policy of insurance was in existence, but the case stated that it was to be taken that the defendants had executed a valid policy to the plaintiffs in their ordinary form, in accordance with a "covering note," which had been given by the defendants to the plaintiffs. The covering note was also unstamped. By the 35 Geo. 3, c. 63, every general sea-policy, and by the 54 Geo. 3, c. 144, every contract or memorandum of insurance must be printed or written on duly stamped paper; and no unstamped policy, contract, or memorandum of insurance, can be subsequently stamped so as to give it legal validity.

Cohen (*Mellish, Q.C.*, and *Nixon*, with him), for the plaintiffs, was stopped, whilst reading the case.

[MARTIN, B. We cannot hear this case. None of the documents on which the alleged contract depends are stamped. There is, therefore, no cause of action.]

The parties have agreed that the matter shall be argued as if a stamped policy and note existed. It is competent to them to do so; they thereby attain the same end as where a defendant agrees with a plaintiff not to plead the general issue to an action on an unstamped policy.

[CHANNELL, B. That is quite a different case. Here the Court are asked whether the plaintiffs can recover on an alleged contract. How can we blind ourselves to the fact that the "alleged contract" rests on unstamped documents, and is no contract at all?]

The Court are asked for their opinion on certain admitted facts, which must, for the purposes of the argument, be assumed to be true.

Sir G. Honyman, Q.C. (*Quain, Q.C.*, and *Littler* with him), contrà, was not called on.

KELLY, C.B. If we were to hear this case, we should be assisting the parties to evade the statutes requiring a policy and covering note to be stamped. Whatever course the plaintiffs and defendants might have chosen to take in pleading, we cannot sanction an evasion of the stamp laws, when it comes under our notice. The case must be struck out.

1867

NIXON v. THE ALBION MARINE INSURANCE CO.

MARTIN, B. I am of the same opinion, and wish to add that this objection is substantial and not technical. The case in reality asks us to decide upon an imaginary cause of action. If we were to hear it, moreover, we should be neglecting the duty imposed on us to protect the revenue.

CHANNELL, B., concurred.

Case struck out.

Attorneys for plaintiffs: *Field, Roscoe, & Co.*
Attorneys for defendants: *Simpson & Cullingford.*

Applied. [1950] 2 All E.R. 1167. BAILEY *v.* BULLOCK.

June 4.

BURTON *v.* PINKERTON.

Contract of Service—Contract to serve as Seaman—Ordinary Voyage—Illegality—Increased Danger—Foreign Enlistment Act (59 *Geo.* 3, *c.* 69), *ss.* 2, 7—*Remoteness of Damage.*

3 Ad E 472
10 QB 115
121

The plaintiff agreed with the defendant to serve as one of the crew of a ship, whereof the defendant was master, for twelve months, from London to Rio, or any other of the ports specified in the agreement, amongst which were ports in the Pacific Ocean, and back to a final port of discharge, and to obey during that period all the defendant's lawful commands. He subsequently sailed for Rio with the ship. She was destined, as it appeared from her charterparty, for the service of the Peruvian government, and had on board a cargo of coal and ammunition. In the course of her voyage to Rio she joined company with two Peruvian war steamers, to which from time to time she supplied coal and ammunition. At Rio it became known to the plaintiff and the defendant that hostilities had commenced between Spain and Peru, two powers at peace with England. The defendant, notwithstanding this circumstance, announced to the plaintiff that he intended to go on to Callao, in the Pacific, another Peruvian port. He was at that time acting under the direction of a Peruvian agent on board the ship, who received his instructions from the commanders of the two war steamers. The plaintiff objected to serve any further on the voyage on the ground that it had become illegal, and involved greater danger than he had anticipated when he entered into his agreement with the defendant. He accordingly left the ship. In an action for breach of contract brought by him against the defendant:—

Held, per Kelly, C.B., Martin and Pigott, BB. (Bramwell, B., doubting), that the defendant must be taken to have engaged the plaintiff for an ordinary voyage, and that the plaintiff was entitled to treat as a breach of contract the defendant's employment of him on a voyage which would expose him to greater danger than he originally had reason to anticipate.

Per Kelly, C.B.: To serve on board a vessel used as a store ship in aid of a belligerent, the fitting out of which to be so used is an offence within the

59 Geo. 3, c. 69, s. 7, is "a serving on board a vessel for a warlike purpose in aid of a foreign state" within s. 2 of that act.

The plaintiff, after leaving the defendant's ship, was imprisoned at Rio for some days as a Peruvian deserter. When he came out of prison the ship had gone, carrying some of his clothes on board of her. The jury awarded damages both for the imprisonment and the loss of clothes :—

Held, per Martin, Bramwell, and Channell, BB. (Kelly, C.B., dissenting), that these damages were too remote to be recoverable.

DECLARATION. 1st count, that in the year 1866 the defendant, being master of the ship *Thames*, by an agreement then made between the plaintiff and the defendant in England, contained in a written and printed document signed by the plaintiff and the defendant according to the Merchant Shipping Act, 1854, retained and employed the plaintiff to serve on board the said ship as one of her crew for a voyage, on terms stated as follows :—"Name of ship, *Thames*. Port of registry, London. Master's name, J. Pinkerton. The several persons whose names are hereto subscribed, and whose descriptions are contained below, and of whom twenty-two are engaged as sailors, hereby agree to serve on board the said ship in the several capacities expressed against their respective names, on the voyage from London to Rio de Janeiro, or any port or ports in North and South America, Northern and Southern Pacific and Atlantic Oceans, West Indies, Cape Colonies, Mediterranean, India, China, and Arabian Seas, Australia, New Zealand, backwards and forwards, if required, for a period not to exceed twelve months, and back to a final port of discharge in the United Kingdom or Continent of Europe between the Elbe and Brest. And the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers, in everything relating to the said ship, and the stores and cargo thereof, whether on board, in boats, or on shore, in consideration of which services to be duly performed the said master hereby agrees to pay to the said crew, as wages, the sums against their names respectively expressed." [The remainder of the agreement is not material.] That the defendant and the plaintiff respectively signed the said agreement, and the capacity in which, and the wages per calendar

1867

BURTON v. PINKERTON.

month at which, the plaintiff was retained as aforesaid, were then respectively expressed in the said document against the name and signature of the plaintiff, and all conditions &c. were fulfilled, yet the defendant did not employ the plaintiff to serve on board the said ship according to the said agreement as aforesaid, and the plaintiff was required to serve otherwise than according to the said agreement, and thereby the plaintiff lost the opportunity of earning wages, and was left at Rio de Janeiro, and arrested and imprisoned there, and was deprived of his clothes and tools, and was impeded in obtaining employment.

2nd count, repeating the allegations in the 1st count, and charging as a breach that the defendant did not employ the plaintiff according to the said agreement, and prevented the plaintiff from serving on board the said ship during part of the said voyage, by sailing and departing with her from Rio de Janeiro aforesaid without the plaintiff, and thereby the plaintiff was deprived of his wages, &c. [alleging damage similar to that in the 1st count].

There were several other counts in the declaration, to which, it is unnecessary to refer.

Pleas. To 1st count, non assumpsit, and 2, traverse of the breach in terms. To the 2nd count, 3, non assumpsit; 4, that the defendant was always ready and willing to employ the plaintiff according to the said agreement, but the plaintiff absented himself from the ship, and refused to be so employed; 5, that after the said contract, and before the alleged breach, the plaintiff misconducted himself in remaining absent from the ship for a time longer than that for which he had received leave, and going on shore without leave, and neglecting his duties and failing to perform the same, wherefore the defendant discharged him, which is the alleged breach; and 6, that after the said contract, and before the alleged breach, the plaintiff deserted the ship, wherefore the defendant rescinded the agreement, and discharged the plaintiff. Issues thereon.

The cause was tried before Kelly, C.B., at the sittings in London after Hilary Term last. Upon the evidence then given on the part of the plaintiff and defendant, the substance of which is fully stated in the judgment of the Court, delivered May the 11th (post,

p. 344), the learned judge considered that the contract with the plaintiff was to employ him for twelve months free from any other perils than those which were incidental to an ordinary voyage for commercial purposes, and that war having broken out between Spain and Peru, two states at peace with England, it was a breach of that contract to place the vessel under the orders of the Peruvian government, and to cause her to act in concert with or under the direction of Peruvian war vessels, thus exposing the plaintiff to extraordinary and unforeseen dangers. He accordingly directed the jury to find a verdict for the plaintiff, being of opinion that the defendant had upon the evidence no defence to the action. The jury assessed the damages resulting from the defendant's breach of contract at 12*l.* 10*s.* for loss of wages, 20*l.* for loss of clothes, and 30*l.* for general damage for imprisonment and otherwise. Leave was reserved to move to enter a verdict for the defendant or to reduce the damages by either or both of the sums of 20*l.* and 30*l.*, on the ground that one or both of those sums were given in respect of damages too remote to entitle the plaintiff to recover in respect of them. The plaintiff whilst on shore at Rio had been imprisoned for ten days as a Peruvian deserter. Whilst he was in prison the ship *Thames* had sailed away, carrying some of his clothes on board.

April 18. *The Solicitor General* (*C. Pollock, Q.C.*, and *H. M. Bompas* with him) moved accordingly, or for a new trial, on the ground of misdirection. 1st, the defendant committed no breach of contract here. A neutral vessel may carry contraband of war to a port of one of the belligerents: *Ex parte Chavasse; In re Grazebrook* (1); *The Helen* (2); *Hobbs* v. *Henning* (3); *Richardson* v. *The Marine Insurance Company*. (4) The voyage, therefore, remained legal, although war had actually broken out between Spain and Peru; and there is nothing in the Foreign Enlistment Act (59 Geo. 3, c. 69), s. 7, to make it illegal. The ship was fitted out and started on her expedition before the commencement of war.

[KELLY, C.B. The *Thames* was doing much more than merely

(1) 34 L. J. (Bank.) 17.
(2) Law Rep. 1 Adm. 1.
(3) 17 C. B. (N.S.) 791; 34 L. J. (C.P.) 117.
(4) 6 Mass. Rep. 102.

1867

BURTON v. PINKERTON.

carrying contraband of war. She was almost exactly in the same position as one of the Peruvian rams. She was acting in concert with them, and receiving orders from an officer of the Peruvian government.]

But she was in fact a neutral vessel, and sailed under British colours, and although sailing in some respects in company with the rams, did nothing except supply them from time to time with contraband of war, an act no more unlawful than carrying contraband into a belligerent port.

[KELLY, C.B. The voyage became a different voyage at Rio. The captain put himself under the immediate orders of the supercargo. That act, whether legal or not, at all events involved the plaintiff in a risk beyond those risks which he would naturally contemplate as resulting from an ordinary commercial voyage; and that the captain thought so is plain, from the circumstance of his offering the crew an increase of pay if they would continue to serve.]

The increase of danger might justify the plaintiff in refusing to continue to serve, though that is doubtful, but not in bringing an action for wrongful dismissal. The contract might be "off" altogether, but the plaintiff, who voluntarily discharged himself, cannot say that the defendant discharged him; and even if the adventure had become positively illegal, the only result would have been the dissolution of the contract: per Lord Ellenborough, C.J., in *Barker* v. *Hodgson*. (1) 2ndly, as to the damages, the loss of clothes and the imprisonment of the plaintiff were not the direct and natural consequences of the defendant's act: *The Elizabeth*. (2)

Cur. adv. vult.

May 11. The judgment of Kelly, C.B., Martin and Pigott, BB., was delivered by

KELLY, C.B. A question of great public importance arises upon a motion made in this case by the Solicitor General for a new trial, or to reduce the damages; and we have thought it right to consider the material facts with great attention, not by reason of any doubt entertained, at least on my part, as to the substantial merits of the

(1) 3 M. & S. 267, 270. (2) 2 Dodson, Adm. Rep. 403.

case, but because it was thought possible that some question ought to have been left to the jury as to the real nature and character of the adventure, and the course actually adopted by the vessel in question as disclosed by the evidence, in relation to the two steam rams belonging to the Peruvian government, and engaged in hostilities against Spain.

The action was brought by the plaintiff, a mariner, to recover damages for the breach of a contract to employ him for twelve months on board the ship *Thames*, upon a voyage to any port or ports in North and South America, Australia, New Zealand, and other places.

The defendant was the master or captain of the ship *Thames*, which proceeded from the port of London on her voyage in the month of February, 1866. The breach of contract alleged is in substance the employment of this vessel for other than commercial purposes, and in a manner exposing the plaintiff to risks and dangers not within the terms of the contract. At the time when the vessel quitted England, war had not actually broken out between Peru and Spain, but on the 25th of February war was declared, and was notified in the *Gazette*, and on the 13th of March the queen's proclamation enjoining strict neutrality was also published in the *Gazette*. It appears upon the evidence alike of the plaintiff and of the defendant, that the ship took in a cargo of coals and provisions, together with 130 casks of ammunition, and two launches, one of them a steam launch, before she left the river. After touching at some places on the English coast, she came into the harbour of Brest, and was then joined by the *Independencia*, one of the two rams belonging to the Peruvian government. She then went to Madeira, where she was joined by the *Independencia* and the other ram, called the *Huasca*, and there put 150 tons of coal on board the *Independencia*. She then left Madeira in company with the two rams, and rockets for signals were put on board the rams. The vessels next reached St. Vincent, signals passing between the rams and the *Thames*. At St. Vincent the second launch was put over the ship's side into the *Independencia*, and two boats belonging to the *Huasca* were taken on board the *Thames*. From thence the *Thames* went to Pedro bay, twelve miles south-west of St. Vincent, the two rams arriving shortly

1867

BURTON v. PINKERTON.

after her, and there she put on board one of the rams the 130 cases of ammunition. Thence she proceeded to Rio, where she arrived on the 31st of March, the two rams arriving there the following day. Two days afterwards one of the rams sailed out of Rio, and captured and brought in as prize a Spanish brig, which was afterwards taken out again and burnt, upon which the defendant observed that they might have given him some of the cordage.

This evidence was uncontroverted on the part of the defendant, the master or commander of the *Thames*, who was himself examined as a witness, and who further gave in evidence the charter-party of the ship, from which it appeared that she was chartered for all lawful services and employments for twelve months, that she was intended for the Peruvian government, and that if she should be damaged or burnt by any enemy of Peru, she was to be valued at 45,000*l.*, to be paid by the charterers to the company. He further proved that the *Independencia* had left London three or four days before the *Thames*. He admitted that the plaintiff and other seamen, after their arrival at Rio, insisted that the voyage had been illegal, and desired to go on shore; that he himself, Captain Pinkerton, had told the consul that his destination was Callao, and that he was acting under the orders of Borras, the supercargo, and agent of the Peruvian government on board, and that it was understood that he was to act in all respects under the direction of the rams belonging to the Peruvian government. He admitted that he knew of the capture of the Spanish brig by the Peruvians, and that it was the talk of the town and generally known. He also admitted that he had told the men that he was going to Callao, and that he would raise their wages if they would go with him, though he denied that he had specified the advance of 1*l.* per month.

I thought upon this evidence that the contract with the plaintiff was to employ him for twelve months on board this vessel, free from any other perils than such as were incidental to a voyage for ordinary commercial purposes, and that war having broken out between Peru and Spain, two states in amity with this country, it was a breach of that contract to place the vessel under the orders of a Peruvian, who was directing and causing her to act in concert with two ships of war belonging to Peru, and engaged in actual

hostilities against Spain, and so exposing the crew to the danger, at any moment, of the loss of their liberty or of their lives.

It is possible that Borras might have given no orders which would have put the ship in peril; but his orders might have been such as to expose her to an attack from a Spanish ship of war, within an hour after she should have left the port of Rio, when she might have been fired into and sunk or captured, and the crew made prisoners of war. The plaintiff could not foresee what these orders or their consequences might be, but he might fairly infer from the mode in which the ship had been employed in aid of and in concert with the rams, from the time when she had quitted Brest, that she would still be directed to accompany and to supply munitions of war, in fact to be, as she had been, a store ship to these two belligerent vessels. It is enough, in my opinion, that Borras had power so to employ her. If this evidence raised any question of fact, it should have been left to the jury. But it appeared to me, and I am still of opinion, that the placing of the vessel at the disposal, and under the command of Borras, was in itself a breach of the contract.

It is unnecessary to determine whether the employment of this vessel in the way thus proved was a violation of the 59 Geo. 3, c. 69. It is certainly against the spirit and intent of that act of parliament which recites that, "the engagement of her Majesty's subjects to serve in war in foreign service without her Majesty's licence (and the fitting out vessels, &c.) may be prejudicial to and tend to endanger the peace and welfare of this kingdom." Then by s. 2 it is expressly enacted that, "if any natural born subject of her Majesty's shall, without such leave and licence, serve in and on board any ship or vessel (used or intended to be used for any warlike purpose) in the service of, or for, or under, or in aid of, any foreign state, &c.;" or, "if any natural born subject shall, without such leave, agree to go, or shall go, to any place beyond seas with intent to serve in any warlike operation whatever in the service of, or under, or in aid of, any foreign state, &c., as an officer, sailor, or mariner, in any such ship or vessel," it shall be deemed a misdemeanor. And by s. 9 offences committed out of the United Kingdom may be tried at Westminster.

By the 7th section it is made an offence to fit out a ship to be

1867

BURTON v. PINKERTON.

used in aid of a belligerent, as a store ship, but the offence must be committed within the British dominions. This ship was so fitted out in London, but before the declaration of war, and therefore the offence was incomplete. But it was actually used as a store ship after the declaration of war, and continued to be so used, under the orders of Borras, after the plaintiff had quitted the ship, and the ship had quitted Rio. If, then, it were necessary to decide the question, I should hold that to serve on board a vessel used as a store ship in aid of a belligerent, the fitting out of which to be so used is an offence within the 7th section, is "a serving on board a vessel for a warlike purpose in aid of a foreign state," within the 2nd section. But if this were doubtful, I am of opinion that so to employ this vessel was a breach of that which I hold to be the contract with the plaintiff, namely, to employ him with the rest of the crew for a specified period on board this vessel upon an ordinary commercial voyage. It is impossible not to see that by adventures like these, this country has been brought to the very verge of war,—first with the United States, and latterly with Spain—and I think that we ought not to permit a doubt to be entertained, whether to engage and employ the crew of a British ship in such an adventure is within the terms of a lawful contract like that which has been entered into between the defendant and the plaintiff. I am, therefore, of opinion that there should be no rule, except to reduce the damages in respect of the loss of clothes and of the imprisonment of the plaintiff; and in this judgment my Brother Martin and my Brother Pigott concur.

BRAMWELL, B. I confess I am not of that opinion, for I think that a rule ought to have been granted. I am not prepared to say that I think the Lord Chief Baron was wrong at the trial, but I am not satisfied he was right. I have sufficient doubt about it to make me think that instead of its being discussed without a rule being granted, it would have been better if it had been discussed after a rule had been granted. The difficulty I feel about it is this: I quite agree that if this vessel was intended to go on what they call a warlike voyage, that is, as a tender to or consort of the rams, the men were entitled to say, "We engaged to go on a voyage of peace, and not to go on a voyage of war, in the course

of which we might be subject to be fired into and be shot." If, however, all she was going to do was to carry contraband of war from port to port, and possibly to run a blockade, I am not so clear that the plaintiff was entitled to say, "That is not a voyage I have undertaken to go, and unless you take me on some other, I am entitled to say you have discharged me." I do not say that even there the plaintiff would not have been entitled to recover, but I should like to have had it discussed. Now as I understand, the direction to the jury was, "Whichever view is correct, the plaintiff is entitled to your verdict," and for that reason I am in doubt, because a jury ought not to be told to find a verdict for the plaintiff unless on any view of the admitted facts he is entitled to it. But I do not differ from any law that was laid down. I merely want to be more advised upon it before I express a decided opinion. I am sure that no man can be more ready than I am to do anything to discourage this sort of business, which, in my opinion, has as little to do with legitimate commerce as smuggling has. For the reasons I have given, however, I should have been glad if a rule had been granted.

Rule refused, except as to the reduction of damages.

May 30. *Edward James, Q.C.*, shewed cause, and contended that damages in respect of imprisonment and loss of clothes could be recovered by the plaintiff.

The *Solicitor General, C. Pollock, Q.C.*, and *H. M. Bompas*, supported the rule.

Cur. adv. vult.

June 4. The following judgments were delivered:—

BRAMWELL, B. We are all of opinion that the plaintiff properly recovered damages for his loss of wages, and that he was also entitled to something under the head of general damage for some of the inconveniences and annoyances he had suffered. One of these, however, was a ten days imprisonment as a Peruvian deserter, and the jury were told that this (amongst other inconveniences) might be considered as damage arising out of the defendant's breach of contract. We may suppose, therefore, that a portion of the 30*l.* was given in respect of the imprisonment which the plain-

1867

BURTON v. PINKERTON.

tiff had undergone. But I think—and my Brothers Martin and Channell concur with me in my opinion—that the plaintiff is not entitled to count this imprisonment as an item of damage. It is true that in one sense the defendant's conduct *caused* the imprisonment: but for that, no doubt, the plaintiff would not have been imprisoned. That, however, is not enough. Suppose, for instance, the plaintiff had met robbers whilst ashore, and been injured by them, he certainly could have recovered nothing from the defendant for such injury, yet the defendant might, in that case also, be said to have caused the damage. According to the ordinary rule, damage to be recoverable by a plaintiff must inevitably flow from the tortious act of the defendant. It must be caused by him as the causa causans, and this imprisonment was not so caused.

Similar considerations apply to the damage given for the loss of clothes, which my Brothers Martin and Channell, and myself regard as not being the natural consequence of the defendant's breach of contract. As, however, the sum of 30*l.* was given generally, and it is impossible to say how much the jury intended as damages for inconvenience and annoyance generally, and how much for imprisonment, there must be a new trial, unless the parties can agree on some sum to which the damages may be reduced.

MARTIN, B. I am of the same opinion, and I think there must be a new trial, unless the plaintiff will consent to abandon all damage beyond the 12*l.* 10*s.* for loss of wages, or unless the parties can agree upon what proportion of the 30*l.* ought to be given to compensate for the general inconvenience suffered by the plaintiff. In respect of his imprisonment and loss of clothes, he is, in my judgment, entitled to nothing. The defendant was not immediately concerned in causing either the one or the other. Damages for breach of contract must be the direct consequences of the breach; and in this case these two items are too remote from it to be recoverable.

CHANNELL, B. I am of the same opinion; but I do not say that the damages may not properly exceed the 12*l.* 10*s.* given for the plaintiff's loss of wages. They must not, however, in my judgment, include anything in respect of the plaintiff's imprisonment or loss of clothes.

KELLY, C.B. With respect to the general damage, I thought, as by reason of the breach of contract by the defendant in placing the vessel under the orders of the Peruvian ships of war he had left the plaintiff no alternative between serving on board the vessel, and so putting his life and liberty in peril, and landing at Rio, and there remaining till he could find a ship in which he could return to England, that the jury might reasonably give damages in respect of such expenses, inconveniences, and hardships as the plaintiff might have incurred during his compulsory residence there. And as the danger would be greater if he had been obliged to land on a desolate island, without food or clothing, and among savages, than if he had been left in a town where, at a small expense, he could be well provided for, so I thought the jury might consider the difference between his being left in a place of security against all but ordinary risks and inconveniences, and his finding himself at Rio exposed to the consequences of his having belonged to a vessel engaged in the hostilities being carried on between Peru and Spain, and therefore, that if the jury thought the imprisonment of the plaintiff had resulted from the state of things at Rio, thus created by the defendant, they might fairly take it into account in estimating the damages. Then as to the loss of clothes, it was directly caused by their having been left on board when the plaintiff landed to consult the consul, and by the ship having sailed when he came out of prison, and when, if he could have ventured to go on board, he might, no doubt, have had his clothes back again.

Rule absolute for a new trial.

Attorneys for plaintiff: *Shaen & Roscoe.*
Attorneys for defendant: *Bischoff, Coxe, & Bompas.*

1867

June 22.

ISAACS *v.* GREEN.

Debtor and Creditor—Deed under s. 192 of the Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134)—*Parties to Deed—Construction.*

A deed was made under s. 192 of the Bankruptcy Act, 1861, between "the several persons whose names are subscribed and seals affixed, &c., creditors of S. G. (the debtor), *on behalf of themselves and all and every other the creditors of S. G.* of the first part, and S. G. of the second part." It contained a covenant by the debtor with all his creditors for payment of a composition on all his debts, and a release by the parties of the first part:—

Held, that the deed was to be read as making all the creditors parties, and that it was therefore valid.

M'Laren v. *Baxter* (Law Rep. 2 C. P. 559) approved and followed.

To a declaration on money counts, the defendant pleaded to the further maintenance of the action a deed under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), made between "the several persons whose names are subscribed and seals affixed in the schedule hereunder written, being respectively, either individually or in co-partnership with others, creditors of Solomon Green (the defendant), of Goulston Street, Whitechapel, Middlesex, beerhouse-keeper, on behalf of themselves and all and every other the creditors of the said Solomon Green of the first part, and Solomon Green, of &c., hereinafter called the said debtor, of the second part."

The deed recited that the debtor "is indebted to the said several persons parties hereto of the first part in the several sums of money set opposite to their respective names in the said schedule hereunder written, and is also indebted to certain other persons in divers sums of money;" that he had agreed to pay a composition of 1*s.* in the pound "to all and every of the creditors of the said debtor, whether executing this deed or not, at the expiration of one month after the complete registration thereof, which composition the said debtor doth hereby, for himself, &c., covenant, &c., with his said creditors, &c., well and truly to pay or cause to be paid at the time and in manner aforesaid; and to be in full discharge of all and every of the debts of the said debtor now due and owing at the time of the execution of these presents." It was witnessed that, "in pursuance of the said agreement, and in consideration of the payment by the said debtor to his said several creditors

1867

ISAACS v. GREEN.

of such composition as aforesaid, they, the said several persons parties hereto of the first part," released the debtor from all actions, &c., claims, and demands, "which they, the said several persons parties hereto of the first part," had against the debtor. And it was declared that the deed was intended to operate as a deed of composition under the Bankruptcy Act, 1861. Averment of the statutable assents to and registration of the deed, and of the performance of all conditions precedent.

Demurrer and joinder.

June 15. *Henry James*, in support of the demurrer. The case is concluded by authority in this court. In *Gurrin* v. *Kopera* (1) the parties to the deed were described in the same words as are here used, and the deed was there held bad on the authority of *Chesterfield and Midland Silkstone Colliery Company* v. *Hawkins*. (2) Now, the deed in the latter case was held bad on the ground that, as the non-assenting creditors were not parties to the deed, they could not sue on the covenant contained in it, and therefore were not on an equal footing with the other creditors. Both these decisions were in conformity with the opinion of Lord Westbury, in *Ex parte Cockburn* (3), that persons not named as parties to a deed cannot sue upon a covenant contained in it, and none of these cases have been overruled. The present case is, in reality, stronger than *Gurrin* v. *Kopera* (1), since there the covenant could only be implied from the recital, whereas here it is distinctly expressed. An inequality is therefore created which is fatal to the deed.

[KELLY, C.B. *Gurrin* v. *Kopera* (1) seems to have been decided on the ground that there was no provision in the deed at all, by which the payment of the composition to the creditors was secured, or could be enforced.]

It could not have been held bad on that ground alone, since *Clapham* v. *Atkinson* (4) had already been decided in the Exchequer Chamber, where a deed was upheld that contained no security for the payment of the composition, nor any means of enforcing it, except the advantage which the debtor would derive from paying

(1) 3 H. & C. 694; 34 L. J. (Ex.) 128.
(2) 3 H. & C. 677; 34 L. J. (Ex.) 121.
(3) 33 L. J. (Bkr.) 17.
(4) 4 B. & S. 730; 34 L. J. (Q.B.) 49.

1867

ISAACS v. GREEN.

the composition rather than the whole debt. If it is suggested that the scheduled creditors sign as agents for the rest, there is no such allegation in the deed, or in the plea; and were it true, yet the strict rules of law, on which these cases were decided, would not allow them to be parties, so as to have a legal right of action on the deed, since they are not named as parties in it; but their rights would only be in equity, to be enforced at law, if at all, through the medium of those actually parties.

McKellar, in support of the plea. The authority of the cases cited upon the other side has been considerably shaken by *Lay* v *Mottram* (1), *Gresty* v. *Gibson* (2), and *Reeves* v. *Watts* (3), which have given a great flexibility to the construction of words describing parties to deeds of this nature, and have favoured a construction which will make the deed valid by embracing all the creditors. *Brooks* v. *Jennings* (4) is a direct authority for the defendant, for the parties to the deed were there described in the same words as here, and the deed contained a recital which was held by the Court to amount to a covenant for payment of the composition. The point as to parties was not very distinctly raised there, but it is plainly laid down by Willes, J. (5), that any creditor could have sued on the implied covenant. The point was, however, distinctly adjudicated upon by the Court of Common Pleas, in a case recently decided, of *M'Laren* v. *Baxter* (6), where a deed drawn in the form of the present deed was supported, and the Court held that, if necessary, it might be read as though a stop were placed after the words "on behalf of themselves," so as in terms to make all creditors parties to the deed.

H. James, in reply.

Cur. adv. vult.

June 22. The judgment of the Court (Kelly, C.B., Martin, Bramwell, and Channell, BB.) was delivered by

KELLY, C.B. This was a demurrer to a plea of a composition deed, and although several objections were raised during the argument, there was, in effect, but one question for our decision,

(1) 19 C. B. (N.S.) 479, 12 Jur. N.S. 56 (4) Law Rep. 1 C. P. 476. 12 Jur. N.S. 341
(2) Law Rep. 1 Ex. 112, 12 Jur. N.S. 319 (5) Law Rep. 1 C. P. at p. 481. 12 Jur. N.S. 342
(3) Law Rep. 1 Q. B. 412, 12 Jur. N.S. 365 (6) Law Rep. 2 C. P. 559.

namely, whether non-assenting creditors were made parties to the deed in such a sense as to enable them to sue on the covenant contained in it. That question turns on the words by which the creditors were made parties. [His Lordship read the words describing the parties.] It was contended that, as there was nothing to shew that these creditors had any authority from the body of the creditors, the deed was only the deed of the executing parties. If that be the true construction, the objection to its validity is of course fatal. A number of authorities were cited to us, especially the case of *Gurrin* v. *Kopera* (1) in this court, and that of *Brooks* v. *Jennings* (2) in the Court of Common Pleas. Reference was made also to the case of *Chesterfield and Midland Silkstone Colliery Company* v. *Hawkins* (3), and to the class of cases beginning with *Ex parte Cockburn* (4), and ending with *Gresty* v. *Gibson.* (5) It is impossible to reconcile all these authorities with each other. We must, therefore, look at the language of the statute, and the intention of the parties, and form a conclusion on this deed for ourselves. If the real meaning of the parties is reconcileable with the statute, then we shall be able to give effect to the deed.

Now, the words of this instrument, when read for the first time, certainly seem to indicate that certain persons, without any authority, purport to execute the deed for others as well as themselves. But, on careful consideration, we find that the language used is similar to that in the introduction to a bill in chancery, filed by a plaintiff on behalf of himself and a number of other persons, where the words used are construed to include and intend the whole body of persons to whom reference is made. And, on looking narrowly at the terms of this deed, we have only, as is suggested in the recent case of *M'Laren* v. *Baxter* (6), to which I shall refer again presently, to suppose a stop after the word "themselves," and the clause may be read so as to include *all* the creditors of the debtor, both those who execute, and those who do not. This construction, I may add, is one which we ought, if possible, to adopt; first, because the statute no doubt intends that all composition deeds,

(1) 3 H. & C. 694; 34 L. J. (Ex.) 128.
(2) Law Rep. 1 C. P. 476.
(3) 3 H. & C. 677; 34 L. J. (Ex.) 121.
(4) 33 L. J. (Bkr.) 17.
(5) Law Rep. 1 Ex. 112.
(6) Law Rep. 2 C. P. 559.

1867

ISAACS v. GREEN.

with none but reasonable conditions, shall be effectual; and secondly, because the unquestionable intention of the parties themselves was to bind all the creditors, and to make them all parties, when the requisite majority in number and value had assented. By adopting this construction, then, we give effect both to the intention of the parties and of the statute.

But, independently of these considerations, it appears that in the recent case of *M'Laren* v. *Baxter* (1) the question before us directly arose. The Court of Common Pleas in that case decided that a deed, in precisely similar terms to those used here, ought to be upheld. We are bound by that authority, and our decision accordingly is for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *E. J. Sidney & Son.*
Attorney for defendant: *Joseph Smith.*

June 24.

[IN THE EXCHEQUER CHAMBER.]

TAYLOR *v.* THE CHICHESTER AND MIDHURST RAILWAY COMPANY.

Corporation created by Statute—Contract—Railway Company—Ultra vires—Power of Directors—Appropriation of Funds of Company by Act—Onus of Proof—Malum prohibitum—Construction.

A railway company being about to apply to parliament for an extension act, an agreement was made under the seal of the company with the plaintiff, a landowner on the course of the intended line, by which, after reciting that the plaintiff had agreed to withhold his intended opposition to the bill on the terms therein mentioned, the company agreed, by clause 3, that they would, within three months after the passing of the bill, pay to the plaintiff 2000*l.*, "as and for a personal compensation to him for the annoyance, inconvenience, disturbance, damage, loss, and injury which he has sustained, or may or will sustain, in respect of the sporting and preservation of game upon his estate, by or in consequence of the construction of the intended railway, and of the parliamentary and other surveys, and other works connected therewith and incidental thereto;" by clause 14, the plaintiff agreed that in consideration of the preceding articles he would not further oppose the passing of the bill during the then present session of parliament.

The bill passed, and three months afterwards the plaintiff brought an action to recover the 2000*l.* mentioned in clause 3:—

Held, first, that clause 3 was an absolute unconditional covenant to pay the 2000*l.* within three months after the passing of the bill.

(1) Law Rep. 2 C. P. 559.

Secondly (by Keating, Mellor, Montague Smith, and Lush, JJ.), reversing the decision of the Court of Exchequer, that the funds of the company being both by the original and the new act appropriated to specific purposes, which did not include the consideration for the present covenant, the covenant sued on was ultra vires, in the sense that the legislature intended that such a contract should not be made, and that the company was therefore not bound by it.

By Willes and Blackburn, JJ., that the contract was not expressly or by necessary implication prohibited, and that the company was therefore bound.

By Blackburn, J., that the case was governed by *Eastern Counties Railway Company* v. *Hawkes* (5 H. L. C. 331).

By Keating, Mellor, Montague Smith, and Lush, JJ.: that *Eastern Counties Railway Company v. Hawkes* was not inconsistent with their decision; and by Mellor, J., that the present case was governed by *Preston* v. *Liverpool &c. Railway Company* (5 H. L. C. 605; 25 L. J. (Ch.) 421), and *Macgregor* v. *Dover and Deal Railway Company* (18 Q. B. 618; 22 L. J. (Q.B.) 69).

By Keating, Mellor, Montague Smith, and Lush, JJ.: When the act by which a company is incorporated limits its objects, and appropriates its funds to defined purposes, a contract made by the company, which discloses on the face of it that, if carried out, it will cause an appropriation of the funds to purposes other than those so authorized, cannot be enforced at law.

By Willes and Blackburn, JJ.: A company incorporated by statute is entitled to make all contracts connected with the purposes of its incorporation not expressly or by necessary implication prohibited; all such contracts are primâ facie valid; and it lies upon the company seeking to repudiate a contract to shew that it is prohibited, not upon the opposite party to shew that it is authorized.

By Keating, Montague Smith, and Lush, JJ.: The appropriation of the funds of a railway company made by its act of incorporation creates a public trust which a court of law will recognise.

By Willes and Blackburn, JJ.: Such an appropriation only creates, at most, a trust for the shareholders, to be enforced by them in equity; but, *quære*, whether they could have any relief in equity against such a contract as that declared on?

Revd 4 H.L. 628

ERROR on the judgment of the Court of Exchequer in favour of the plaintiff, on demurrers to pleas.

Declaration on an agreement between the plaintiff and the defendants, dated the 17th of February, 1865, by which, after reciting that the plaintiff had agreed to withhold his intended opposition to a proposed railway bill of the defendants, upon the terms and conditions thereinafter contained, it was agreed that in the event of the bill being passed during the then present session, the defendants would, within three calendar months after the passing of the bill, pay to the plaintiff the sum of 2000*l.*, as and for &c. (setting out the third clause of the agreement, which is stated below in the plea). The declaration then alleged that the bill was passed, and

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

that more than three months had elapsed, and averred performance of conditions precedent. Breach, that the defendants had not paid the 2000*l.*, or any part thereof.

First plea, setting out the articles of agreement in full. The agreement, which was expressed to be made between the Chichester and Midhurst Railway Company, incorporated by the Chichester and Midhurst Railway Act, 1864, of the one part, and Sir Charles Taylor of the other part, and was duly executed by both parties, recited that Sir Charles Taylor, the plaintiff, was owner of an estate in Sussex; that the company, the defendants, had given notice of their intention to apply to parliament for an act to enable them to make a railway from their own line so as to form a junction with the London and South Western railway; that as the line of the proposed railway would pass through the plaintiff's property, so as to intersect and seriously damage the same, the plaintiff had accordingly intimated to the company his intention to oppose the bill. That in order to induce the plaintiff to withhold his opposition to the bill, the company agreed to enter into the stipulations and engagements thereinafter contained; and that the plaintiff had in consideration thereof agreed not further to oppose the passing of the bill.

It was witnessed, that in pursuance of the agreement, and in consideration of the premises, the plaintiff and the defendants mutually agreed as follows:—

1. That in the event of the bill being passed into an act during the then present session of parliament, the company would make the proposed railway so that it should pass through the plaintiff's estate in the line, or within the limits of deviation, shewn on the annexed plan, or in some modified line that might be mutually agreed on; and would not, without the plaintiff's written consent, make that portion of the railway for which the deviation line was intended as a substitute, in the line shewn on the plans deposited with the clerk of the peace.

2. That in the like event, the company would purchase from the plaintiff, and the plaintiff would sell to the company for 2000*l.*, the part of the estate required for the railway, being about twenty acres.

3. "In the like event, the company will, in addition to the said

sum of 2000*l.*, and within the space of three calendar months after the passing of the bill, pay to the said Sir C. Taylor the further sum of 2000*l.*, as and for a personal compensation to him, the said Sir C. Taylor, for the annoyance, inconvenience, disturbance, damage, loss, and injury, which the said Sir C. Taylor has sustained, or may, or will sustain, in respect of the sporting and preservation of game upon his estate, by or in consequence of the construction of the intended railway, and of the parliamentary and other surveys, and other works connected therewith and incidental thereto."

4. That the company would in the like event pay the costs of title and conveyance.

5. That the several sums of 2000*l.* should not include any compensation payable for buildings, timber, tenants' compensation, or commonable rights.

6. A provision as to the sum to be paid for any further pieces of the plaintiff's land which the company might require, which was to be at the rate of 100*l.* an acre for inclosed land, and for waste land 25*l.* an acre.

7 and 8. Provisions for the payment of compensation for buildings and timber on the land to be then taken, or to be thereafter taken under clause 6.

9. The company to make and maintain accommodation works as therein mentioned.

10. The company to make a station at a place named, at which all ordinary passenger trains should stop.

11. The company to remove and preserve the surface soil for the benefit of the plaintiff.

12. The company to make compensation for buildings adjacent to the railway and injured by its construction.

13. The company to pay, within one month after the passing of the act, 125*l.* for solicitor's fees, &c.

14. "In consideration of the preceding articles the said Sir Charles Taylor will not further oppose the passing of the said bill during the present session of parliament."

15. That if the plaintiff should desire that the company should ratify the agreement after the passing of the bill, the company should at their own cost execute a formal instrument for that purpose.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

16. A provision for settling by arbitration any differences between the parties, arising upon or out of the agreement.

17. A provision avoiding the agreement if the company should fail to obtain an act in the then session of parliament, authorizing the constructing of the intended railway, or any railway, through any part of the plaintiff's estate.

The plea then alleged that the railway had not, nor had any part thereof, nor had any works been made or constructed; and that the defendants had not required or taken for the purpose of the railway or otherwise any part of the plaintiff's land mentioned in the agreement, or any land, tenement, or estate of the plaintiff; nor had ever given any notice of requiring or taking the said land or estates in the agreement mentioned, or any part thereof, or any lands, or tenements, or estates of the plaintiff; nor had ever agreed with the plaintiff or any person or persons for the purchase or taking of any such lands, tenements, or estates, otherwise than as by the agreement.

Demurrer and joinder.

Second plea, repeating the allegations in the first plea, and alleging that the plaintiff did not sustain annoyance, inconvenience, disturbance, damage, loss, or injury, in respect of the sporting and preservation of game upon his said estate, in consequence of the construction of the railway, or of the parliamentary or other surveys or otherwise, connected therewith or incidental thereto, and that the land, or estate, or plaintiff's interest in the same, never was injuriously affected by the execution of any works of the said railway or company.

Demurrer and joinder.

The Court below gave judgment for the plaintiff, and the defendants brought error.

Feb. 7. *Mellish, Q.C.* (*Hannen* with him), for the defendants. The covenant sued on is an absolute and independent covenant to pay 2000*l.* within three months after the passing of the bill. Admitting, for the sake of argument, that the agreement is valid and binding on the company so far as it relates to the purchase of the land, and that the breach of it would form a good ground of action; and admitting also, that, as decided in *Simpson* v. *Lord*

Howden (1), a contract to buy off opposition in parliament is not illegal, yet this contract, whether considered as made by the directors affecting, as promoters of the bill, to bind the funds to be raised under it, or as administering the funds of the company under the old act, was ultra vires. The power of promoters to bind a company by their contracts at all has been much questioned in the case of *Preston* v. *Liverpool &c. Railway Company* (2), and that case is at least an authority that such contracts, to be binding on the company, must be contracts which the company could itself have lawfully entered into after its formation; it is also an authority that to enter into a covenant with a person to pay him a sum of money for not opposing them in parliament, would be ultra vires in the company. It is true the decision did not necessarily involve either proposition, but they were both so far relevant that they determined the construction of the contract then in question; and in order not to give it an illegal character, that, which the plaintiff contended to be an absolute contract, to take effect whether the railway was or was not made, was construed by the House of Lords to be dependent on the making of the railway and the taking of the plaintiff's land; as had been done before in a similar case by the Queen's Bench in *Gage* v. *Newmarket Railway Company*. (3) In *Earl of Shrewsbury* v. *North Staffordshire Railway Company* (4), Kindersley, V.C., not being able to put any construction on the contract which would not make it otherwise than ultra vires, held it to be void, laying down that the application of the funds of the company to the purchase of such countenance and support as were there bargained for could not be authorized even by a majority of shareholders at a general meeting, as against a single dissentient shareholder. A similar decision was arrived at by the Court of Common Pleas, in *East Anglian Railway Company* v. *Eastern Counties Railway Company* (5), on a contract by the defendants to take a lease of the plaintiffs' line, and it proceeded on the ground that a corporation established by act of parliament could only apply its funds to the purposes authorized by the act.

(1) 9 Cl. & F. 61.

(2) 5 H. L. C. 605; see p. 621; 25 L. J. (Ch.) 421.

(3) 18 Q. B. 457; 21 L. J. (Q.B.) 398.

(4) Law Rep. 1 Eq. 593, 618.

(5) 11 C. B. 775, 811; 21 L. J. (C.P.) 23, 26.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

[BLACKBURN, J. The opinion of Parke, B., in *South Yorkshire Railway Company* v. *Great Northern Railway Company* (1), is at variance with the opinion of Jervis, C.J., in *East Anglian Railway Company* v. *Eastern Counties Railway Company* (2), and assumes that corporations so created have power to do all acts which they are not expressly or by clear implication prohibited from doing; and this opinion is supported by Erle, J., in *Mayor of Norwich* v. *Norfolk Railway Company* (3) and *Bostock* v. *North Staffordshire Railway Company*. (4) The question is, whether a breach of the statutory directions as to the destination of the funds is merely a breach of trust to be restrained by a shareholder, or altogether an illegal act.]

The case of *East Anglian Railway Company* v. *Eastern Counties Railway Company* (2) was followed by the Exchequer Chamber in *Macgregor* v. *Dover and Deal Railway Company* (5), and expressly assented to by Lord Cranworth, C., in the House of Lords in *Eastern Counties Railway Company* v. *Hawkes*. (6) A breach of a trust contained in an act of parliament is an illegal act, and a covenant to commit a breach of a trust so created is illegal. But by s. 7 of the company's old act (27 & 28 Vict. c. lxxv), and by s. 11 of their new act (28 & 29 Vict. c. cccliv), the funds to be raised under each act by shares or mortgage are to be applied only to the purposes authorized by the acts respectively. If, then, the covenant were only for the payment of costs incurred by the directors in soliciting the new act, it would, so far as regards the funds raised under the first act, be clearly illegal on the authority of the cases cited; and, so far as regards the funds raised under the second act, would only be valid under the usual clause directing costs to be paid (s. 27). It would still more certainly be illegal under both acts, if it were a direct covenant to pay a sum of money to the plaintiff for withdrawing his opposition. But the contract is, in truth, nothing else, as is shewn by the fact that the money is to be paid whether any land is taken or not; it cannot, therefore, be any part of the com-

(1) 9 Ex. at p. 84; 22 L. J. (Ex.) at p. 13.
(2) 11 C. B. at p. 811; 21 L. J. (C.P.) at p. 27.
(3) 4 E. & B. at p. 416; 24 L. J. (Q.B.) at p. 110.
(4) 4 E. & B. at p. 813; 24 L. J. (Q.B.) at p. 231.
(5) 18 Q. B. 618; 22 L. J. (Q.B.) 69.
(6) 5 H. L. C. at pp. 347–8.

pensation for the land. It is true some other trifling inconveniences are stated, which are obviously on the face of the agreement not the real consideration, but these, if not connected with the land, were not subjects of compensation under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 16), and will not assist the validity of the contract. If it is objected, that to hold this contract void would deprive promoters and directors of the power to compromise with opponents, the answer is, that if they do so, they should put clauses in their bill confirming and validating such contracts, and the shareholders would then have fair notice of the claims to which the company is to be subject.

Manisty, Q.C. (*Sir G. Honyman, Q.C.*, and *H. Lloyd*, with him), for the plaintiff. The case is untouched by the authorities cited for the defendants. It is, in the first place, free from the difficulty of the promoters, who made the contract, being different persons from the company who are to be bound by it; for this is the case of the old company merely seeking powers to make a new line. Further, the agreement must be taken to have been bonâ fide entered into for the considerations and under the circumstances stated in it. Even if the consideration given by the plaintiff were confined to withholding opposition, there is nothing to shew, and the contrary may be assumed, that the company did not save many thousand pounds in parliamentary expenses. Such an advantage, obtained by the company through the plaintiff's desistance from his legal right of opposing them in parliament, is a perfectly good consideration; and it might even be contended that a liability so incurred would be within the section of the new act (s. 27), directing the costs of passing the bill to be paid out of the money to be raised under the act. But it is stated to include, and evidently does include, other considerations, such as the detriment, both present and future, suffered by the plaintiff through the defendants' surveys, &c., and the increased difficulty in the preservation of game. The contract, then, is one which would have been perfectly valid if made after the passing of the bill, and it is one, therefore, which the defendants, as promoters, were capable of making.

[MELLOR, J. Suppose a line were projected, and a contract of

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

this sort were entered into with a secret agreement to apply next session to parliament for a deviation?]

Such an agreement might be a fraud on parliament, but nothing of the kind is alleged. This is in fact only making an agreement beforehand which the company might certainly have made afterwards and upon a matter on which they must ultimately have come to some agreement. Requiring the plaintiff's land, the company wished to settle the terms at the outset. This distinguishes the case from *Earl of Shrewsbury* v. *North Staffordshire Railway Company* (1), where the consideration was confined entirely to personal annoyance; here, on the contrary, a substantial consideration is shewn, and if that exist the Court will not inquire into its adequacy, or into the value of other considerations that may be joined with it. The cases of *Gage* v. *Newmarket Railway Company* (2) and *Preston* v. *Liverpool &c. Railway Company* (3) were both cases of mere construction, as appears clearly from the remarks of Lord Cranworth in the latter case (4); and the House of Lords there expressly abstained from laying down any general principle as to contracts of the directors which were ultra vires; and in *Eastern Counties Railway Company* v. *Hawkes* (5), they came to a decision which directly supports the plaintiff's contention. The true principle, it is contended, is that which was laid down by Lord Wensleydale in *South Yorkshire Railway Company* v. *Great Northern Railway Company* (6), and by Erle, J., in *Mayor of Norwich* v. *Norfolk Railway Company* (7) and *Bostock* v. *North Staffordshire Railway Company*. (8) With respect to the appropriation of the funds of the company by the two acts, this has reference only to the money raised by shares and mortgages, but there is nothing to prevent the sum agreed on from being paid out of other sources of income. If necessary, however, the defendants can, by section 27 of the second act (28 & 29 Vict. c. cccliv), pay it out of the new capital to be raised under that act.

(1) Law Rep. 1 Eq. 593.
(2) 18 Q. B. 457; 21 L. J. (Q.B.) 398.
(3) 5 H. L. C. 605; 25 L. J. (Ch.) 421.
(4) 5 H. L. C. at pp. 620–2.
(5) 5 H. L. C. 331.
(6) 9 Ex. at p. 84; 22 L. J. (Ex.) at p. 313.
(7) 4 E. & B. at p. 416; 24 L. J. (Q.B.) at p. 110.
(8) 4 E. & B. at p. 813; 24 L. J. (Q.B.) at p. 231.

[WILLES, J. The payment is expressed to be partly in consideration of trespasses committed on the plaintiff's land, and it does not appear that the consideration for these trespasses may not have amounted to 2000*l.*]

Mellish, Q.C., in reply. The company can be answerable for no trespasses but such as were committed by their officers or agents in pursuance of the powers given to them. But as it was not within the power or duty of the directors to survey for a new line on behalf of the old company, the defendants cannot be answerable for trespasses so committed. Neither is such a payment within the final clause of the new act. The plaintiff's remedy, therefore, is only against the individual trespassers; and their acts can form no consideration as against the company. As to the suggestion that the money might be paid otherwise than out of the share capital of the company, the intention is obviously to make it payable out of this fund, and further, 8 Vict. c. 16, ss. 120-3, appropriates all profits to dividends, subject to a power to set apart a sum for working expenses.

[LUSH, J. If the judgment stands, the plaintiff may issue execution against the assets of the company, and if there are none, against the shareholders to the extent of their unpaid shares.]

Preston v. *Liverpool &c. Railway Company* (1) is as strong in favour of the defendants as anything can be, short of a direct decision upon the point, for if the agreement there had been construed to be, as this one clearly is, an agreement to pay the money in any event, whether the land was or was not needed or taken, it is plain that the House of Lords would have decided that it was ultra vires. As to the distinction between a right enforceable at law and in equity, the distinction between the two systems is one that at least ought not to be allowed to prevail where the trust broken is one created by a public act of parliament for public purposes. If it were otherwise the question of ultra vires is one which could never arise in a court of law.

[BLACKBURN, J. It could not, unless the act in question were so prohibited as to make it illegal.]

The case of *East Anglian Railway Company* v. *Eastern Counties Railway Company* (2) must be overturned if the plaintiff's con-

(1) 5 H. L. C. 605; 25 L. J. (Ch.) 421. (2) 11 C. B. 775; 21 L. J. (C.P.) 23.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

tention is to succeed; but it has the assent of Parke, B., in *South Yorkshire Railway Company* v. *Great Northern Railway Company* (1), in the very judgment relied upon on the other side, in which he cites that case without disapproval, and it is also supported by what is said by Lord Campbell in *Mayor of Norwich* v. *Norfolk Railway Company*. (2) As to section 27 of 28 & 29 Vict. c. cccliv, it cannot be extended so far as to cover a covenant of this nature.

Cur. adv. vult.

June 24. The following judgments were delivered:—

MONTAGUE SMITH, J. My Brothers Keating and Lush concur in the judgment I am about to deliver.

The covenant sued upon is contained in an agreement between the plaintiff and the defendants, the Chichester and Midhurst Railway Company, incorporated by an act of parliament, in 1864, for making a railway from Chichester to Midhurst. [The learned judge stated the agreement (reading the recitals and the second and third articles), and the effect of the pleadings.]

It will be observed that the second article of the agreement, relating to the purchase of the land, contains no provision as to time, and does not ascertain the specific land which would be required for the construction of the railway. It is not necessary for the Court to decide whether this covenant is an absolute covenant to purchase the land, or conditional upon the company requiring the plaintiff's land for their railway; and, if absolute, whether it would be ultra vires of the company, so as to fall within the dilemma pointed out in the decision in *Gage* v. *Newmarket Railway Company* (3), and in *Preston* v. *Liverpool &c. Railway Company*. (4) The covenant now in question is in terms an absolute covenant to pay 2000*l.* within three months after the passing of the act, as a personal compensation to the plaintiff for the assumed inconvenience and injury described in it.

It is contended, on the part of the plaintiff, that as this sum of

(1) 9 Ex. at p. 84; 22 L. J. (Ex.) at p. 313.
(2) 4 E. & B. at p. 444; 24 L. J. (Q.B.) at p. 105.
(3) 18 Q. B. 457; 21 L. J. (Q.B.) 398.
(4) 5 H. L. C. 605; 25 L. J. (Ch.) 421.

2000*l.* is thus made payable to the plaintiff absolutely and in all events, whether the company make their railway or not, whether they take the plaintiff's land or not, and notwithstanding that the damage and inconvenience, which are substantially prospective, may never be done or suffered, the covenant provides for a misappropriation of the funds of the company, and that it is, therefore, ultra vires, and the action upon it cannot be maintained.

It appears to us that this contention is well founded, and ought to prevail. The agreement being made conditional on the passing of the new act, it is necessary to consider the position of the company under both their acts; but, granted that it follows from the decision of the House of Lords in *Eastern Counties Railway Company* v. *Hawkes* (1) that there may be agreements which, being ultra vires of the company under their old act, might be sanctioned and so brought intra vires by the new act, we think this agreement cannot be deemed to be so sanctioned, and that it is ultra vires of the company under both their acts.

The 7th section of their first act (27 & 28 Vict. c. lxxv) enacts, that the moneys authorized to be raised by shares or mortgage shall be applied to the purposes only "by this act authorized." And by the 11th section of the second act (28 & 29 Vict. c. cccliv) it is enacted that "all and every part of the moneys which the company are by this act authorized to raise by new shares or mortgage shall be applied only to the purposes authorized by this act." Now if, from inability to raise money or other causes, the new railway shall never be commenced, this money would still be payable to the plaintiff under the covenant, without any equivalent whatever: for there would be no land or other thing to represent the money. Moreover, if no money could be raised under the powers of the new act, it would have to be paid out of the funds of the company arising under their original act. The funds of the company would thus come to be appropriated to purposes other than those to which, under either of the acts, they could only be applied; and so, to purposes in effect prohibited.

It appears that the covenant to pay this money was entered into as an inducement to the plaintiff not to oppose the bill in parliament; but if the plaintiff's agreement to withhold opposition is

(1) 5 H. L. C. 331.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

relied on as sufficient consideration, there is strong authority in the recent decisions to overthrow the opinion that an agreement to pay a sum for buying off an opposition to a bill is within the scope of the powers of an existing railway, or can be fastened upon it after the new act has been obtained: see *Preston* v. *Liverpool &c. Railway Company* (1), and see the decisions collected and commented on by V.C. Kindersley in *Earl of Shrewsbury* v. *North Staffordshire Railway Company*. (2)

There seems to us to be direct authority that this covenant to pay money out of the funds of the company absolutely, whether the line is made or not, and the damage is done or not, is ultra vires. In the case of *Gage* v. *Newmarket Railway Company* (3), Lord Campbell, in giving the judgment of the Court, delivers a distinct opinion, that if the deed in that case could have such a construction it would be ultra vires and void; and the Lord Chancellor (Lord Cranworth) in his judgment in *Preston* v. *Liverpool &c. Railway Company* (4), in the House of Lords, gives a strong opinion to the same effect. No doubt these opinions are in some sense dicta, but they are dicta of great weight and high authority; for in both these cases the judgments put the plaintiff in the dilemma, either that the covenants to pay the money were conditional on the company acquiring the lands, or, if they were to be construed as absolute covenants for payment, whether the land was acquired or not, then they were ultra vires; and the judgments on the latter point only became dicta because the plaintiff failed by being fixed on the first horn of the dilemma. The case of *Eastern Counties Railway Company* v. *Hawkes* (5) has been relied on in favour of the plaintiff; but it appears to us to be clearly distinguishable from the present. In that case the Eastern Counties Railway Company, who were promoting a bill for a new line, agreed with Mr. Hawkes to purchase his property for 8000*l.*, and to pay him a further sum of 5000*l.* for compulsory eviction. In fact, it was an agreement to give him 13,000*l.* for his property, such price including, as is usual, a sum for compulsory purchase.

(1) 5 H. L. C. 605; 25 L. J. (Ch.) 421.
(2) Law Rep. 1 Eq. 593. 12 Jur. N.S. 63
(3) 18 Q. B. 457; 21 L.J. (Q.B.) 398.
(4) 5 H. L. C. at p. 622.
(5) 5 H. L. C. 331.

The noble and learned lords appear to have considered that this was the ordinary case of a contract made by a railway company, for the purchase of lands required by the company for their authorized railway; and they decided that, although made by the company before they obtained their new act, it was to be regarded when that act was passed as authorized and sanctioned.

But in that case the learned lords expressly guarded themselves from being understood to infringe on the principle of former decisions. The Lord Chancellor, in giving judgment, refers with approbation to the important case of *East Anglian Railway Company* v. *Eastern Counties Railway Company* (1), and to the judgment of Jervis, C.J., in that case. One objection made to the contract with Mr. Hawkes was, that the company had contracted for more land than they required for the railway, and that the contract was so far ultra vires; this objection was, however, answered by the consideration that the property might be really so injured as a whole that the company would be bound to take the whole, or might really want the whole; and that, at all events, it did not appear on the face of the agreement that this might not be so. The broad distinctions between that case and the present, therefore, are, that *there* the contract was for the purchase of land required for the railway, and there was an equivalent for the price paid, whereas *here* the money is contracted to be paid for damage which may never be done, and in respect of which money there may be no value or equivalent whatever. It appears to us to be clear, from the subsequent case of *Preston* v. *Liverpool &c. Railway Company* (2) (already adverted to), that the House of Lords understood their own decision in *Eastern Counties Railway Company* v. *Hawkes* (3) in the sense in which I have endeavoured to interpret it.

But it was, secondly, contended on the part of the plaintiff, that although this covenant may be ultra vires of the company, it is only so in the sense that individual dissentient shareholders might obtain relief in a court of equity, and that the agreement being under seal, the company, as a company, are bound by their covenant in a court of law. It seems to us that this distinction is

(1) 11 C. B. 775; 21 L. J. (C.P.) 23.

(2) 5 H. L. C. 605; 25 L. J. (Ch.) 421.

(3) 5 H. L. C. 331.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

not sound. We think that if a contract made by a company incorporated by act of parliament for defined and limited objects, discloses on the face of it a covenant which, if enforced, would cause the funds of the company to be appropriated to purposes other than those to which the act says they shall "only" be applied, such an agreement cannot be made the foundation of an action. In the case of railway companies it is necessary, not only for the interest of shareholders, but of the public, that this should be so. The public are undoubtedly interested in the maintenance of a railway authorized by parliament. Landowners and other persons have probably sustained much individual loss and inconvenience for that which is assumed to be a public good; and all the queen's subjects have an interest that the funds of the company should not be improperly diverted from the purposes to which parliament has declared they shall be applied. This view of the law was presented in explicit terms by Jervis, C.J., in *East Anglian Railway Company* v. *Eastern Counties Railway Company* (1), already referred to. It would be of little use for the legislature to define the limits of action of companies and the application of their funds, if a different rule were to prevail; and it seems reasonable to hold, that when parliament does define the objects of a company and the appropriation of its funds, it by implication prohibits other objects and a different appropriation. The principle cannot be more clearly stated than in the language of Parke, B., in *South Yorkshire Railway Company* v. *Great Northern Railway Company* (2), "But where a corporation is created by an act of parliament for particular purposes, with special powers, then indeed another question arises. Their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was ultra vires—that is, that the legislature meant that such a deed should not be made."

The principle so laid down was adopted and acted upon by Lord Campbell, C.J., in his judgment in *Mayor of Norwich* v. *Norfolk*

(1) 11 C. B. at p. 811; 21 L. J. (C.P.) at p. 26.
(2) 9 Ex. at p. 84; 22 L. J. (Ex.) at p. 314.

Railway Company. (1) Indeed, Lord Campbell had before declared in *Gage* v. *Newmarket Railway Company* (2), that, in his opinion, a deed ultra vires would be void at law. The doctrine was also very distinctly stated by Jervis, C.J., in delivering the judgment of the Court in the case of the *East Anglian Railway Company* v. *Eastern Counties Railway Company* (3), already referred to, where it was held that a contract by the Eastern Counties Railway Company to pay the costs of promoting a bill in parliament to obtain the lease of another railway company was void, and that no action could be maintained on it.

In *Eastern Counties Railway Company* v. *Hawkes* (4), Lord Cranworth, C., after referring to certain cases in equity, says: "In all these cases the discussion was raised by shareholders calling in question the misapplication, or intended misapplication, of the corporate funds by the directors. But the doctrine has been acted on in the courts of common law, to the extent of holding that a contract, even under the seal of the company, cannot in general be enforced, if its object is to cause the corporate property to be diverted to purposes not within the scope of the act of incorporation;" and Lord Cranworth, after referring in support of this proposition to the judgment of Jervis, C.J., in *East Anglian Railway Company* v. *Eastern Counties Railway Company* (3), and to other cases, speaks of it as "well-settled doctrine."

If, then, in the present case, the first branch of the contention on the part of the defendants is established, as we think it is, viz. that the covenant sued upon is a contract for the appropriation of the funds of the company to a purpose not authorized, and by implication prohibited by the acts of incorporation, and so ultra vires, there would certainly appear to be very strong authority to support the second part of the defendants' contention, viz. that such a contract cannot be made the foundation of an action.

For these reasons we are of opinion that the judgment of the Court of Exchequer ought to be reversed.

(1) 4 E. & B. at p. 446; 24 L. J. (Q.B.) at p. 125. 13 Jur. N.S. 344, 352.
(2) 18 Q. B. at p. 469; 21 L. J. (Q.B.) at p. 403.
(3) 11 C. B. at p. 811; 21 L. J. (C.P.) at p. 26.
(4) 5 H. L. C. at p. 347.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

Montague Smith, J., read the judgment of

MELLOR, J. I am of opinion that the judgment of the Court below ought to be reversed. I have had the opportunity of reading the judgment of my Brother Blackburn, as well as that of my Brother Montague Smith, and, inasmuch as the facts of the case are fully set out in those judgments, it is not necessary that I should repeat them.

I think that we are concluded by the judgment of the Court of Common Pleas in *East Anglian Railway Company* v. *Eastern Counties Railway Company* (1) which was expressly affirmed by the Court of Exchequer Chamber in *Macgregor* v. *Dover and Deal Railway Company* (2), in which case Alderson, B., in delivering the judgment of the Court, said: "The question is, we think, determined by the decision of the Court of Common Pleas in *East Anglian Railway Company* v. *Eastern Counties Railway Company*. (1) It is there laid down, that a railway company incorporated by act of parliament, is bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatsoever." And it was accordingly held that the parties to the agreement in that case must be taken, with full knowledge of the powers conferred on the South Eastern Railway Company, to have made a contract by which the defendant was to bind the company to do an illegal act; not merely an act which they had no power to do, but an act contrary to public policy, and the provisions of a public act of parliament. And it was accordingly held to be a void contract, and one which could not form "the proper ground for a suit in a court of law."

It was contended in the argument before us, that the decision in that case must be considered as qualified by the superior authority of the *Eastern Counties Railway Company* v. *Hawkes*. (3) I confess that I am unable so to understand the latter case. It is clear that the Lord Chancellor did not consider that the conclusion at which the House of Lords arrived was at all at variance with the *East Anglian Railway Company* v. *Eastern Counties Rail-*

(1) 11 C. B. 775; 21 L. J. (C.P.) 23.
(2) 18 Q. B. 618, 631; 22 L. J. (Q.B.) 69, 70.
(3) 5 H. L. C. 331, 348.

way Company (1), and the case of *Macgregor* v. *Dover and Deal Railway Company* (2), for he cited them with approbation, and in the course of his judgment said: "It must now, therefore, be considered as well settled doctrine, that a company, incorporated by act of parliament for a special purpose, cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be." There is nothing in the judgments delivered by the other noble and learned lords which shews that they intended to qualify or overrule the doctrine established by those cases; and the judgment of the House of Lords appears to have proceeded upon the ground that the company having made a bargain with the respondent for the sale of lands to them, arranged as part of the terms that they should not only purchase lands which they expected to require for the construction of the line of railway they were promoting, but also that they should purchase the respondent's house and grounds at a given sum, in order to avoid any claim for damages to such residence and grounds which might arise from the construction of the railway. It was therefore treated as one of those ordinary bargains made with landowners for the purchase of lands at an agreed price; and the decree for a specific performance was accordingly made, notwithstanding the company did not actually require the property in question, in consequence of the legislature having declined to authorize the construction of the line of railway in the exact course contemplated by the promoters at the time the agreement was made.

Whether all that was said in that case can be reconciled with the cases above referred to may be questionable; but I am quite satisfied that it was not intended to affect them as authorities. I think that the facts of the present case bring it within the authority of the later case of *Preston* v. *Liverpool &c. Railway Company* (3), in which Lord Cranworth, C., after referring to a dictum of Lord Campbell to the same effect, is reported to have said, that "he should have had no possible doubt that it was ultra vires of a corporation established for making a railway, to enter into a covenant to pay 5000*l.* for not opposing them in

(1) 11 C. B. 775; 21 L. J. (C.P.) 23. (2) 18 Q. B. 618; 22 L. J. (Q.B.) 69.
(3) 5 H. L. C. 605, 622.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

parliament. To do so was beyond the powers to be conferred, or that ever were conferred upon the directors of a railway company." It is true that the bargain there was with the promoters, and not with the company, but the reasoning of Lord Cranworth clearly brings it within the rule which ought to govern the present case; for he said, in substance, that no contract of the promoters would bind the company, which the company, when formed, would not have entered into. The observations of Vice Chancellor Kindersley in *Earl of Shrewsbury* v. *North Staffordshire Railway Company* (1) also seem to me strongly to support the contention of the learned counsel for the defendants, that the covenant under consideration is either void, as being ultra vires, or illegal, as being impliedly prohibited by the clauses of both acts of parliament, which appropriate the money authorized to be raised to the purposes only of the acts. There is nothing in the view which I take of this case which is inconsistent with the judgment of Parke, B., in *South Yorkshire Railway Company* v. *Great Northern Railway Company* (2), in which, distinguishing between the contracts of ordinary corporations and those of corporations created by acts of parliament for particular purposes with special powers, he said of the latter that "their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating them, or by necessary or reasonable inference from its enactments, that the deed was ultra vires, that is, that the legislature meant that such a deed should not be made. The cases cited on the argument of *East Anglian Railway Company* v. *Eastern Counties Railway Company* (3), *Macgregor* v. *Dover and Deal Railway Company* (4), and *Bagshaw* v. *Eastern Union Railway Company* (5), are of this description;" and he adds that Lord St. Leonards, though strongly expressing his dissatisfaction with such defences, "intimates his opinion, given with some reluctance, that these cases are rightly decided, and that they are cases in which it appears that the company did enter into engagements clearly beyond their powers

(1) Law Rep. 1 Eq. at p. 608.
(2) 9 Ex. at p. 84; 22 L. J. (Ex.) at p. 313.
(3) 11 C. B. 775; 21 L. J. (C.P.) 23.
(4) 18 Q. B. 618; 22 L. J. (Q.B.) 69.
(5) 2 Mac. & G. 389; 19 L. J. (Ch.) 410.

and that parties contracting with them must be supposed to know it." And Martin, B., speaking of the *East Anglian Case* (1), and the *Dover and Deal Case* (2), said (3), "They must be taken to govern all the courts in Westminster Hall." I think that the statutes by which the defendants were incorporated did constitute them a company created for particular purposes, with special powers, and that the application of the funds to be raised under them is limited to prescribed and definite objects; and that, by reasonable inference from the provisions of the statutes, the bargain now under consideration is prohibited, and that its performance by the defendants would amount, not merely to a breach of trust, the remedy for which would be in equity, but that the contract itself being ultra vires and illegal, because prohibited, the defence is properly raised in a court of law. However we may regret to give effect to the repudiation of a bargain entered into by the directors of a company, we cannot fail to see that the directors of railway companies often, I fear, through indirect motives, do enter into contracts and engagements most ruinous to the interests of shareholders, who may have been led into a false security by the very limitations of the authority expressed or impliedly contained in the acts of incorporation. Considering the present case to fall within the principle and reasoning to be found in decisions of the highest authority, and which, so far as I am aware, have never been impugned by the judgment of any court, I am compelled to come to the conclusion that the judgment of the Court below must be reversed.

Willes, J., read the judgment of

BLACKBURN, J. This is an action brought upon a covenant under the seal of the defendants, by which they bound themselves, in the event of a bill then pending in parliament being passed into an act, to pay to the plaintiff within the space of three months next after the passing of the bill, the sum of 2000*l*.

The pleas set out the agreement in hæc verba. [The learned

(1) 11 C. B. 775; 21 L. J. (C.P.) 23.
(2) 18 Q. B. 618; 22 L. J. (Q.B.) 69.
(3) 9 Ex. at p. 73; 22 L. J. (Ex.) at p. 307.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

judge stated the agreement down to the third article, and proceeded.] Then follow other stipulations as to the expenses of making out the title and the purchase of other lands if required, which it is unnecessary to notice further than to say, that they would not become operative unless some portion of the plaintiff's land was taken; and by the last stipulation—17—it is agreed that this agreement shall be void if the company fails to obtain an act in the present session of parliament, authorizing the construction of the said intended railway, or of any railway, through any part of the estate of Sir Charles Taylor.

The first plea then proceeds to aver that the defendants have not taken, or given notice to take, any part of the plaintiff's land for the purpose of making the line; and the second plea, that the plaintiff did not sustain any annoyance, &c., as mentioned in the third stipulation.

To each plea there is a demurrer.

The Court of Exchequer gave judgment for the plaintiff, on which error has been brought.

The case was argued in the sittings after last Hilary Term, before my Brothers Willes, Keating, Mellor, Montague Smith, Lush, and myself, when the Court took time to consider.

It is plain that the special averments in the pleas do not affect the question, for the stipulation is that the money should be paid within three months after the passing of the act which conferred on the company the power to make the line through the plaintiff's land and to cause annoyance and inconvenience; and it was clearly not intended that the payment was to be delayed till that power was actually exercised, and this was not disputed on the argument. But Mr. Mellish, who argued for the defendants, contended that the agreement was not one that could be enforced. After the decision of the Court of Exchequer Chamber and the House of Lords in *Simpson* v. *Lord Howden* (1), it was not open to him to contend that the agreement was in itself illegal, or that it might not have been enforced against any private persons, who, being promoters of a railway bill, had executed a deed containing similar stipulations on their part; but he relied on the fact that the defendants were a railway company, who, at the time they executed the deed,

(1) 10 A. & E. 793; 9 Cl. & F. 61.

were incorporated by the Chichester and Midhurst Railway Act, 1864 (27 & 28 Vict. c. lxxv), a public act: that the act which they did obtain after the making of the agreement (the Chichester and Midhurst Railway Extension Act, 1865, 28 & 29 Vict. c. cccliv) was also a public act, that the latter act contained no provision relating to this agreement, or sanctioning it; and that both contained the clauses usual in such acts, appropriating the capital authorized to be raised for the purposes of the acts. And he argued that such an agreement as this was an agreement to appropriate 2000*l.*, part of the funds to be raised under one or other of these acts, to a purpose not sanctioned by either of them, and consequently was void, as being what is commonly called ultra vires. On this point, which is no doubt one of difficulty, we had the advantage of hearing an able argument by Mr. Mellish for the defendants, and Mr. Manisty for the plaintiff; and, after consideration, I have come to the conclusion that the judgment below in favour of the plaintiff was right, and should be affirmed.

I must first observe that this question is raised on a record in which there is no averment of fraud or deception of any kind, and we must therefore proceed on the assumption that the transaction was bonâ fide, and really what it is represented on the agreement to be; and this at once distinguishes the case from that of *Earl of Shrewsbury* v. *North Staffordshire Railway Company* (1), where Vice Chancellor Kindersley came to the conclusion (stated in his judgment (2)), that the agreement was not what it professed to be, and was in no way connected with the injury to the land, but was simply a bargain to give Lord Shrewsbury 20,000*l.* merely for his countenance and support.

And it is also to be observed that, even so construing the agreement, the Vice Chancellor thought that the question did not arise before him whether such an agreement was ultra vires in the sense that it was prohibited by the railway acts; but that the agreement having been made with the individual promoters before they were incorporated, the question was, whether it was ultra vires in the sense that the directors (after incorporation) could not bind all the shareholders to submit to it. As reported in the Law Reports,

(1) Law Rep. 1 Eq. 593; 35 L. J. (Ch.) 156. 12 Jur. N.S. 163

(2) Law Rep. 1 Eq. at p. 612. 12 Jur. N.S. 164.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

the Vice Chancellor says (1): "I am of opinion that neither a resolution of a board of directors, nor the vote of the majority of shareholders at a general meeting, could authorize the application of any portion of the funds of the company to the purchase of such countenance and support, *even as against a single dissentient shareholder*. Such an application of the funds of the company would be clearly ultra vires." In the report in the Law Journal he is made to point out the distinction more explicitly (2): "When you speak of ultra vires of the company, you mean one or other of two things, either that you cannot bind all the shareholders to submit to it, or that it is ultra vires in this respect, that the legislature, for instance, having authorized you to make a railway, you cannot go and make a harbour. But in the present case *the latter question does not arise*. The question is, *whether it is ultra vires as being beyond the power of the directors to bind all the shareholders*." I think the distinction which the Vice Chancellor here takes is a just and a very important one; and as I think it goes far to decide the present case, I shall examine it more at length.

The legislature, in passing special acts by which railway and other trading companies are incorporated, have in view two distinct purposes. They incorporate a body of shareholders who seek as a trading speculation to carry out a particular scheme for their own benefit, and they at the same time, being satisfied that the scheme will be for the benefit of the public, confer on the body thus incorporated certain privileges, and impose on them certain restrictions, for the benefit of the public.

As the shareholders are in substance partners in a trading concern the management of which is committed to the body corporate, a trust is by implication created in favour of the shareholders that the corporation will manage the corporate affairs, and apply the corporate funds for the purpose of carrying out the original speculation. The rights thus conferred on the shareholders, as between them and the corporation, are very analogous to those between partners inter se, and like those, depend upon the terms on which the parties entered on the joint speculation. Any shareholder has a right to object to any act being done which is in contravention of the rights thus given to him. Though the majority of the

(1) Law Rep. 1 Eq. at p. 618. (2) 35 L. J. (Ch.) at p. 172.

12 Jur. N.S. 89

shareholders, or even all but himself approve, yet he has a right to object to the making or the enforcing of any contract to do any unauthorized act which would affect his individual interest.

But the shareholder may waive any right which is given to him for his own protection only; and if he has either expressly or tacitly done so, he can no longer object; and neither a stranger, nor the body corporate itself, can raise such an objection to a contract made by the corporation, if no shareholders choose to raise it for themselves.

But the legislature, with a view to public policy, does, sometimes expressly, sometimes by implication, prohibit the doing of certain acts by companies thus incorporated, and when an act is thus made malum prohibitum, any contract to do it is illegal; and if there is an attempt made to enforce such a contract, the defendant, whether a company or an individual, may, if his conscience permit him, set up the illegality to which he was a party; for in pari delicto potior est conditio defendentis. Though every shareholder in the company had assented to the making of a particular contract, yet if the legislature have, not merely for the protection of the shareholders, but for the good of the public, forbidden the making of it, it is illegal, and the corporation whose shareholders have all assented is in no worse position for raising the defence than the chairman of the company who has personally entered into the contract, and yet may, as was decided in *Macgregor* v. *Dover and Deal Railway Company* (1), set up the provisions of the railway acts as making his personal contract illegal.

The question whether a particular thing is thus prohibited by the statutes must in every case depend upon the true construction of them.

I think it very unfortunate that the same phrase of "ultra vires" has been used to express both an excess of authority, as against the shareholders, and the doing of an act illegal as being malum prohibitum: for the two things are substantially different; and I think the use of the same phrase for both has produced confusion. When the objection to a particular contract is that it may affect the interest of the shareholders, the objection can be raised by them in a court of equity, as is very clearly pointed out by

(1) 18 Q. B. 618; 22 L. J. (Q.B.) 69.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

Vice Chancellor Wood in *Maunsell* v. *Midland Great Western of Ireland Railway Company.* (1) He says: "With regard to the question which is now raised, and which has been so ably discussed, I must consider the exact position in which the plaintiffs stand. They are not the Midland Company coming here, as has been suggested in the course of the argument, seeking to set aside their own agreement, but they are certain shareholders who, finding the common seal of their company attached to a document by which they conceive that they are affected in a manner in which their directors are not authorized to affect them, come here for a very ordinary equity, namely, to be relieved from the consequences of such an improper use of the common seal. This is an entirely different position, of course, from that in which the company themselves would stand, if they came here to be relieved from the consequences of their own act."

I think that any objection made only on the ground that it affects the interest of a shareholder, can only be made by or on behalf of the shareholders, and therefore cannot be made in a court of law at all, but must, if raised at all, be raised in a court of equity. It might perhaps be enough to say that on this record there is no allegation that there is any shareholder who did not acquiesce in the promoting of this bill; but I think no such allegation would have made the pleas good at law, as the objection would concern no one but the shareholder, who is not and cannot be a party to the action at law, and I think it important to point this out. For in my opinion it is not a mere technical distinction, whether such an objection must be raised in a court of equity or in a court of law. It is a difference, not merely of the form in which the issue shall be raised, but of what the substance of that issue shall be. The seemingly technical point raises the question whether the smallest excess of authority renders the whole contract illegal, and so entitles those who have the management of the corporation (and who, therefore, presumably were as individuals consenting parties to the contract) to repudiate the contract in the name of the company, however long it has been acquiesced in, and however seriously the position of the plaintiff has been altered in consequence of that acquiescence; or whether the objection should

(1) 32 L. J. (Ch.) at p. 515; 1 H. & M. at p. 160.

be held to lie only in the mouth of those shareholders, who were not consenting parties to the contract sought to be set aside, or have not by laches or otherwise rendered it inequitable in them to set it aside. It is obvious that an adherence to this distinction will prevent those scandalous cases which have rendered the word repudiation a term of opprobrium.

But it was contended on the part of the defendants that the legislature have, for reasons of public policy, expressly or by necessary implication, forbidden railway companies to make any application of their funds which a dissentient shareholder could stop, and so rendered it malum prohibitum; and therefore any contract to perform any act involving such an expenditure is illegal; or at all events that it has forbidden such an expenditure; and if either position is correct, no doubt a court of law has no power or right to inquire into the expediency of the legislation which has rendered that contract illegal. Any defendant who is sued on an illegal contract may shew the illegality, and then the Court has but one duty, and that is to refuse to enforce the illegal contract. But I do not agree in either position.

The case of the *East Anglian Railway Company* v. *Eastern Counties Railway Company* (1) was much and properly relied on by the counsel for the defendants. There the question before the Court of Common Pleas was as to the validity at law of an agreement under seal between four railway companies, to the effect that three of them, which were ultimately incorporated into and formed the East Anglian Railway Company, should prosecute in their own names bills for forming railways; that the defendants, the Eastern Counties Railway Company, should take a lease of the railways when made for 999 years; that the defendants should furnish all capital necessary for completing the railways, should have the control of the proceedings before the committees, and should pay all the costs of those proceedings. The Court decided that this agreement was illegal, and forbidden by the statutes under which the defendants, the Eastern Counties Railway Company, were authorized to raise their capital and required to apply it to the making and maintaining of the Eastern Counties Railway. The Court acted on the principle that the power to raise funds for

(1) 11 C. B. 775, 811; 21 L. J. (C.P.) 23, 27.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

a particular concern, and the enactments directing them to be applied for that purpose, were for the public purpose of procuring that concern to be carried out, and that any application of the funds to any other purpose was forbidden and illegal. And they seem to treat the question exactly as if the plaintiff had been suing an ordinary common-law partnership, and the question was as to the authority of the body corporate to bind each of the individual parties, and conclude by saying: "We are therefore bound to say that any contract relating to such bills (those promoted by the East Anglian Company) is not justified by the act of parliament, is not within the scope of the authority of the company as a corporation, and is therefore void." And I do not deny that it may properly be inferred from that language, that those who concurred in that judgment thought that everything not expressly or impliedly authorized as against the shareholders was forbidden as against public policy, and void.

This case was followed by that of *Macgregor* v. *Dover and Deal Railway Company* (1), where a declaration, which alleged that the plaintiff in error (defendant below), Macgregor, being chairman of the South Eastern Railway Company, had promised that his railway company should guarantee the defendants in error against the costs of a bill which they promoted, was held by the Court of Exchequer Chamber to be bad in arrest of judgment, as it was "a contract by which the defendant is to bind the company to do an illegal act; not merely an act which they have no power to do, but an act contrary to public policy and the provisions of a public act of parliament."

This case was not overruled by the decision of the House of Lords in *Eastern Counties Railway Company* v. *Hawkes* (2); indeed, it was in terms declared to be untouched by that decision, though I think it will be found to be much restricted by it; and being the decision of the Court of Exchequer Chamber, it is binding on us when sitting in this Court. I think, therefore, we are bound to hold, not merely that a contract to do an act forbidden by a public statute as contrary to public policy, is illegal and void—a doctrine in which I completely concur—but also that the provisions relating to the appropriation of the capital to the purpose of the statutes

(1) 18 Q.B. 618; 22 L. J. (Q.B.) 69. (2) 5 H. L. C. 331.

17 Jun 21

authorizing it to be raised, are not merely for the benefit of the shareholders, which, therefore, they may waive, but are for the public benefit, making an appropriation of the funds to other purposes, such as those in the contract then before the Court of Exchequer Chamber, malum prohibitum. Erle, J., in *Mayor of Norwich* v. *Norfolk Railway Company* (1), impugns this decision with great force of reasoning; and if I were now advising the House of Lords, I should wish to reconsider the point. But as the decision of *Macgregor* v. *Dover and Deal Railway Company* (2) was in the Exchequer Chamber, and has never been reversed, I think we are bound to follow it as far as it goes. But I do not think that the position to be inferred from the language of the judgment in the *East Anglian Railway Company* v. *Eastern Counties Railway Company* (3), that every appropriation of the funds that is not so far authorized by the statutes as to be binding on a dissenting minority of shareholders, is therefore forbidden and illegal, is at all part of the decision of the Court of error so as to be binding on us. I think, moreover, it is wrong, and that, if it were part of the decision, it has been departed from in subsequent cases.

In *South Yorkshire Railway Company* v. *Great Northern Railway Company* (4), which occurred directly afterwards, Lord Wensleydale (then Baron Parke) says: "Generally speaking, all corporations are bound by a covenant under their corporate seal properly affixed, which is the legal mode of expressing the will of the entire body, and are bound as much as an individual is by his own deed. Contracts with partnerships stand upon a different footing. They relate to the power of one member of a partnership to bind the other, and constitute a branch of the law of principal and agent. In partnerships, where all the members do not concur in the contract (and it is often that they do not), one partner may bind the other in all contracts within the scope of their ordinary partnership dealings; in those beyond, the individual partners making the contract are bound, not the other partners. But

(1) 4 E. & B. at p. 412; 24 L. J. (Q.B.) at p. 111.
(2) 18 Q. B. 618; 22 L. J. (Q.B.) 69.
(3) 11 C. B. 775; 21 L. J. (C.P.) 23.
(4) 9 Ex. 55, 84; 22 L. J. (Ex.) 305, 313.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

corporations, which are creations of law, are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred. But where a corporation is created by an act of parliament for particular purposes with special powers, then, indeed, another question arises. Their deed, though under their corporate seal and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was ultra vires—that is, that the legislature meant that such a deed should not be made."

This is very different from the doctrine which might be inferred from the expressions used in the judgment in the *East Anglian Railway Company* v. *Eastern Counties Railway Company* (1), viz. that all acts not so authorized by the legislature as to be binding on dissentient shareholders are void, as not being "within the scope of the authority of the company as a corporation." Lord Wensleydale's mode of stating the proposition has been adopted, as expressing the true doctrine, by the Court of Queen's Bench, in *Chambers* v. *Manchester and Milford Railway Company* (2); by the Court of Common Pleas in *South Wales Railway Company* v. *Redmond* (3); by the Court of Exchequer in *Bateman* v. *Mayor &c. of Ashton-under-Lyne* (4); by Lord Cranworth, C., in delivering the judgment in the House of Lords in *Shrewsbury and Birmingham Railway Company* v. *North Western Railway Company* (5); and I think, therefore, we are entitled to consider the question to be, not whether the present defendants had, by virtue of their acts of incorporation, authority to make the contract, but whether they are by those statutes forbidden to make it. And I think that the cases subsequent to that of the *East Anglian Railway Company* v. *Eastern Counties Railway Company* (6), and more particularly that of *Eastern Counties Railway Company*

(1) 11 C. B. at pp. 813-14; 21 L. J. (C.P.) at p. 26.

(2) 5 B. & S. 588; 33 L. J. (Q.B.) 268. 11 Jur N.S. 700

(3) 10 C. B. (N.S.) 675.

(4) 3 H. & N. 323; 27 L. J. (Ex.) 458.

(5) 6 H. L. C. 113, at p. 136; 26 L. J. (Ch.) at p. 493. 3 Jur N.S. 775

(6) 11 C. B. 775; 21 L. J. (C.P.) 23.

v. *Hawkes* (1), shew that the present contract (assuming it to be really what it purports to be) is not forbidden, and consequently is legal as against the corporation, though a shareholder (if there be one), who did not acquiesce in the promotion of this bill and the making of such contract by the directors, may, perhaps, have a right in equity to have the contract cancelled.

The first objection to the contract is, that the defendants were not, by the Chichester and Midhurst Railway Act, 1864, authorized to promote a bill for an extension. And they certainly were not so authorized as against their shareholders. It is said by Lord Campbell, in delivering his opinion in *Eastern Counties Railway Company* v. *Hawkes* (2), "The shareholders of the company might, if they pleased, object to their funds being applied to defraying the expense of soliciting the bill; but if they remain quiet, it may be fairly inferred that they all approve of the extension; and when the bill to authorize the extension has received the royal assent, no shareholder can any longer complain." But even if the bill had been rejected, there would not have been anything illegal in paying the costs of the fruitless application. This was the decision of the majority of the Court of Exchequer in *Bateman* v. *Mayor of Ashton-under-Lyne.* (3) In that case, a contract by a waterworks corporation, to pay for work done to enable them to promote a bill for an extension of their powers, was held not to be forbidden by their act of incorporation, and was therefore binding at law. And of this decision I entirely approve.

Indeed, considering how very many bills have been promoted by railway and other companies without the legislature ever objecting to entertain them, and what very large sums have been paid for the costs of such applications when they have not been successful, the position, that all such applications were forbidden by the legislature as against public policy, and that all such payments were illegal, would be very startling. I think it would logically follow, from the reasoning in *East Anglian Railway Company* v. *Eastern Counties Railway Company* (4); but I think it is in the nature of a reductio ad absurdum.

(1) 5 H. L. C. 331.
(2) 5 H. L. C. at p. 357.
(3) 3 H. & N. 323; 27 L. J. (Ex.) 458.
(4) 11 C. B. 775; 21 L. J. (C.P.) 23.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

In the *South Wales Railway Company* v. *Redmond* (1), the defendant, having entered into and broken a contract to run a steam vessel in connection with the trains of the plaintiffs railway, set up the alleged illegality of the contract, as being ultra vires of the plaintiffs. But the Court held that the objection only applied where, as Erle, C.J., said, "the object to be effected was something *wholly unconnected* with the purposes of the incorporation;" or, as Williams, J., more cautiously said, did not apply where the contract, and what was to be done under it, "was directly connected with the working of the railway and the objects of its extension." This is in accordance with *Bateman* v. *Mayor of Ashton-under-Lyne.* (2) I apprehend that in either case a shareholder who had come promptly to a Court of equity might have obtained an injunction, on the ground that the contracts, though not forbidden as against public policy, were not authorized as against the private speculators.

It was further urged—and I think this was the objection mainly relied on—that at all events the agreement sued on was one to buy off the plaintiff's opposition, by giving more than the value of his land taken, and also a sum of money in addition, which it was obviously intended should be given to the plaintiff personally, and that, it was said, at all events, was ultra vires. But this objection is, I think, completely met by the decision of *Eastern Counties Railway Company* v. *Hawkes* (3), which, being a decision in the House of Lords, is binding on us, and seems to me precisely in point. There the company promoted a bill for the purpose of obtaining powers to make a line which would pass near Hawkes's house, and through part of his property. By an agreement under the seal of the company, reciting that Hawkes had opposed the passing of the bill, but had consented to withdraw his opposition upon the company entering into the agreement thereinafter contained, it was agreed that, in the event of the bill passing into a law, the company would purchase the whole of Hawkes's lands for 8000*l.*, to be paid by the company within eighteen months after the passing of such bill as aforesaid, and further, would at

(1) 10 C. B. (N.S.) 675, 685, 686.
(2) 3 H. & N. 323; 27 L. J. (Ex.) 458.
(3) 5 H. L. C. 331.

the same time pay 5000*l.* as a compensation for the personal annoyance and inconvenience of compulsory eviction from his residence. The company abandoned their line, and never required any portion of his land; yet the House of Lords decreed the specific performance of the agreement, and the payment of the whole 13,000*l.*

The object in separating the 5000*l.* from the 8000*l.* was avowedly because Mr. Hawkes was only tenant for life of the land, and it was intended that he should have that to himself personally. Probably, in the present case, the provision as to the 2000*l.* is divided from the other stipulations for the same reason. But be that as it may, I cannot see what distinction can be made which would render the covenant to pay the now plaintiff 2000*l.* within three calendar months after the passing of the present act illegal, and yet leave the covenant to pay Mr. Hawkes 5000*l.* within eighteen months of the passing of that act valid. In both agreements the obvious intention of the company was to buy off the opposition of a landowner, by giving him, in addition to the value which he would obtain for his land, a sum of money for his personal benefit. The legislature have not thought fit, in express terms, to prohibit a contract for this additional payment. According to the construction put in *Pole* v. *Pole* (1) on the 73rd section of the Lands Clauses Consolidation Act, 1845, they have made the recipient (if a tenant for life) trustee for the remainderman; a provision which certainly seems to me to negative any implied prohibition of such a contract.

It was also objected that the money was to be paid within three months after a bill enabling a company to take the plaintiff's land should become law, and that, therefore, the money would be payable even though the defendants should abandon their line, and never touch the plaintiff's land at all; and in support of this objection, counsel cited the statement in the judgment of the Court of Queen's Bench in *Gage* v. *Newmarket Railway Company* (2), that if the covenant before them had been to that effect they would have held it illegal, and the strong dictum of Lord Cranworth, in *Preston* v. *Liverpool &c. Railway Company* (3), that

(1) 2 Dr. & Sm. 420; 34 L. J. (Ch.) 586. 11 Jur. N.S. 477

(2) 18 Q. B. 457; 21 L. J. (Q.B.) 398.

(3) 5 H. L. C. at p. 622.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

even if the Court of Queen's Bench had stated nothing of the sort he should have had no possible doubt that it was ultra vires.

These are, no doubt, authorities to be treated with much deference; but it seems to me that they are completely inconsistent with the decision in *Eastern Counties Railway Company* v. *Hawkes*. (1) As Lord Cranworth was a party to the decision in that case, what he says in *Preston* v. *Liverpool &c. Railway Company* (2) must have been intended to be qualified by him in some way so as to make it not inconsistent with that decision; perhaps he meant to confine his observation to a case in which it could be made to appear that the payment of the money was to be wholly unconnected with the power to take the land, and was really to be only to purchase the countenance and support of a great man: as Kindersley, V.C., afterwards construed the contract in *Earl of Shrewsbury* v. *North Staffordshire Railway Company* (3); but as the dictum stands in the report it does not seem so limited. In *Eastern Counties Railway Company* v. *Hawkes* (1) the railway company had bound themselves, in consideration of Mr. Hawkes withdrawing his opposition, that within eighteen months of the passing of the act they should purchase the plaintiff's estate for 8000*l.*, and pay him the further sum of 5000*l.* for his compulsory eviction from it. The railway company never made the line, never took the plaintiff's land, and within the eighteen months gave him notice that they did not want his land, and his eviction was in consequence of his insisting on compelling them to adhere to their bargain. Lord St. Leonards, in his opinion in the House of Lords, when dealing with another point, says (4): "Where directors are acting in the obvious line of duty, as in this case, *buying off an opposition* and acquiring property, &c.;" and it certainly is very difficult to understand how the plaintiff could, by putting in a stipulation enabling him to force the railway company to take his land which was not wanted for the line which they had abandoned, make the contract valid, if without such stipulation it was illegal. I own I think that the effect of the decision of *Eastern Counties Railway Company* v. *Hawkes* (1) is to establish, that though the shareholders may, if they take proper steps in proper time, stop their

(1) 5 H. L. C. 331.
(2) 5 H. L. C. at p. 622.
(3) Law Rep. 1 Eq. 593, 12 Jur. N.S. 63.
(4) 5 H. L. C. at p. 371.

directors from promoting a bill for an extension, yet that the legislature has not made the soliciting such a bill, or the making ordinary contracts for the purpose, illegal and mala prohibita because the promoter is a railway company. I think that decision does not overrule the decision in *East Anglian Railway Company*, v. *Eastern Counties Railway Company* (1), and in *Macgregor* v. *Dover and Deal Railway Company* (2), that contracts involving the application of the funds of railway companies to purposes foreign to those for which they are incorporated, are illegal as being forbidden by the legislature on grounds of public policy; but I think it restricts the application of that doctrine to cases where the purpose is foreign to, and clearly unconnected with, that for which the company was incorporated. The effect of this and some other decisions of the House of Lords is stated by Lord St. Leonards in the end of his judgment to be, "to place the powers and liabilities of directors and their companies in making contracts, and in dealing with third parties, upon a safe and rational footing. They do not authorize directors to bind their companies by contracts foreign to the purpose for which they were established; but they do hold companies bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their acts, and which cannot clearly be shewn not to fall within them." (3)

If any shareholder in the present company has never been a party to treating the promotion of the bill for the extension line and the bargaining with the proprietors along it to withdraw their opposition as within the object of their act, nothing I have said is meant to prejudice his trying, in a court of equity, to set aside the agreement; but I think that we cannot hold the corporation entitled to treat it as illegal and void without overruling *Eastern Counties Railway Company* v. *Hawkes*. (4)

I think, therefore, that the judgment below should be affirmed.

WILLES, J. I am of the same opinion. I agree generally in the judgment of my Brother Blackburn, but with great reserve so far as relates to the statement in his judgment, that the share-

(1) 11 C. B. 775; 21 L. J. (C.P.) 23.
(2) 18 Q. B. 618; 22 L. J. (Q.B.) 69.
(3) 5 H. L. C. at pp. 381-2.
(4) 5 H. L. C. 331.

1867

TAYLOR v. CHICHESTER AND MIDHURST RAILWAY CO.

holders could have any relief in equity against such a contract. I am by no means satisfied that they could. It is no part of my duty to look into that point; but I entirely agree with my Brother Blackburn, that if there be anything contrary to the duty of the directors in having put the corporate seal to the contract in this case, it amounts to a breach of trust only, and a breach of trust in respect of matters which may affect the shareholders only. There may be a sufficient surplus over and above all expenses to pay the shareholders; they may, consistently with these pleadings, have all joined and agreed, and been parties to the putting of the corporate seal. And even if it appear in a court of law that the directors have signed an agreement in breach of a trust not of a public nature (and I take it the trust for the shareholders is not of a public nature), the Court must enforce it, subject to the interference of the Court of Chancery: *Warwick* v. *Richardson* (1); *Lord Newborough* v. *Schröder*. (2)

I desire also to add to the cases which have been referred to by my Brother Blackburn, the case of *Scottish North Eastern Railway Company* v. *Stewart* (3), which he has not noticed in his judgment, and which I have seen the importance of too late to communicate with him upon it. Having recently looked over this case it appears to me to have a more direct bearing on the present than probably any of us supposed whilst the judgments were being prepared. There an agreement, very similar to that now sued upon, was entered into between Sir William Stewart and the Scottish North Eastern Railway Company. A branch railway was to be made (just as here there was to be an extension to form a junction), and the agreement (probably made for the purpose of inducing him not to oppose) was, that the company should, before breaking ground, pay to Sir W. Stewart, for "personal inconvenience and annoyance, which would of necessity arise to him during the formation of the line through his grounds and preserves," such a sum as a named person should determine. Then his lands were to be purchased, if the lands were taken. There was a proceeding in the court of session in the nature of a claim

(1) 10 M. & W. 284. (2) 7 C. B. 342; 18 L. J. (C.P.) 200.
(3) 3 Macq. 382.

for specific performance, and the Court of session made a decree accordingly.

There was an appeal to the House of Lords, and they reversed that judgment, on the ground that the company had done nothing, and had taken no steps towards breaking ground or taking land; and that upon the true construction of the agreement the compensation for personal annoyance, &c., was only to be paid in the event of the land being taken. Upon that ground the decree of the Court of session was reversed, and upon that ground only, as I read the report. But in the course of that case many points were discussed which have arisen in the present case, and I think the opinions of Lord Wensleydale and Lord Cranworth in particular are very important. The learned lords, Lord Wensleydale in particular, with a view to future litigation, went on to say what they supposed would be the effect of the agreement in an action for damages; and the head-note gives very clearly the result of the statements of those noble and learned lords upon this point. That case appears to me precisely analogous to the present, with the exception that there the agreement was to pay the stipulated sum "before breaking ground," here "within three months after the bill shall have passed." Lord Wensleydale there repeats, and I think in somewhat more distinct terms, what he had laid down with reference to the power of a statutory corporation, and with respect to the burden being upon those who say that a contract of such a corporation under its corporate seal is not valid. To establish that assertion, he says (1): "There can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England, and without it in Scotland, except when the statutes by which it is created or regulated expressly or by *necessary* implication *prohibit* such contract between the parties. Primâ facie all its contracts are valid, and it lies upon those who impeach any contract to make out that it is avoided." He proceeds to consider first of all the question, whether there could be an action upon the contract whereby the company had beforehand agreed with Sir William as to the price that they should pay for his land; and what does he say as to that? "No objection can, I think, be made on the ultra vires doctrine to a

(1) 3 Macq. at p. 415.

1867

TAYLOR v. CHICHESTER AND IDHURST RAILWAY CO.

contract by a company, who wish to alter one of the branches of its railroad" (that is, to the same effect as was intended by the act of 1865 in this case), "and are about to apply to parliament for authority to do so, engaging to purchase land from a neighbouring proprietor if they should obtain their act." Lord Wensleydale expresses at large a decided opinion with reference to the contract to purchase land: he says that it was valid. He went on to consider the contract to make personal compensation; and as to that he points out there was a difficulty, because the plaintiff was only a life renter, and there was a clause in the Scotch act requiring that any moneys paid to life renters by a railway company should be invested in a particular manner; therefore he suggested that probably that part of the contract could not be enforced in that particular case, because it *was* against the directions of that particular clause of the act of parliament. But he does not in the least suggest that it would not—on the contrary, his opinion seems to be quite clear that it would have been—a good agreement, but for that difficulty arising out of the express prohibition of the act.

The only distinction I can see between that case and the present is with regard to the three months. But suppose you may want land, and can get it by paying down a sum of money three months hence, on better terms and with greater advantage than could be obtained by making such a payment at the period when the land is actually to be taken or injured; under such circumstances, I cannot understand—I was about to say it astounds me to learn—that a person who has a legal right and capacity to purchase the thing when he wants it, cannot provide beforehand what he has to pay, and pay it down, simply because, though expecting he will want it, and being determined to have it, it is just possible that he may not want it when the time to take it comes. That is a sort of leading-string that I cannot find any trace of in the act of parliament which constitutes the company.

I should mention that Lord Cranworth (1) laid down very distinctly the doctrine, which my Brother Blackburn discussed with reference to *Eastern Counties Railway Company* v. *Hawkes* (2), namely, that what he calls a "bribe" (that is, an agreement to give a certain sum of money as a bribe to buy off opposition to

(1) 3 Macq. at p. 408. (2) 5 H. L. C. 331.

a railway bill in parliament) cannot be enforced. But he explains away that view, I think, very much in the same way as my Brother Blackburn explains it in his judgment, by saying that in that particular case he thought there was nothing at all to shew that it was a bribe to Sir W. Stewart, but rather a payment; and that payment, it appears to me, stands in all respects on the same footing as that which was to be paid to Sir Charles Taylor in the present case.

Therefore, without saying that I assent to all the conclusions of my Brother Blackburn, especially with regard to what the Court of Chancery would do, which is a question I do not think it necessary to enter upon, I am clearly of opinion that this agreement was not ultra vires of the company, and that upon the passing of the act of parliament it became perfectly valid. I would notice, as, in my opinion, a matter of extreme importance in this agreement, and as bringing it entirely within the fair scope of what the company might do, that there was a proviso that the agreement was to be void if the act of parliament was not obtained.

I must therefore concur with the judgment of my Brother Blackburn; but, as the majority of the Court are of a different opinion, the judgment must be in accordance therewith, namely, that the judgment of the Court of Exchequer be reversed.

Judgment reversed.

Attorneys for plaintiff: *Rogerson & Ford.*

Attorneys for defendants: *Faithfull, Son, & Coode.*

1867
June 12.

JACOBSON *v.* LAMERT.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Debtor and Creditor—Deed of Assignment—Unreasonableness—Trustees' Discretion—Charging Expenses of obtaining Creditors' Assents on Estate.*

16 Q 249.

A deed under the Bankruptcy Act, 1861, s. 192, whereby the debtor assigned his whole property to trustees for the benefit of his creditors, contained the following amongst other clauses:—1, a clause charging his property in the trustees' hands primarily with the expenses of obtaining the creditors' assents to the deed; and 2, a clause empowering the trustees from time to time to determine the dividends payable to the creditors, and to pay the same "at such place and in such manner as they should think fit:"—

Held, that both these provisions were reasonable.

DECLARATION. 1st count, on a bill of exchange, by the drawer against the acceptor; 2nd count, for money lent and for money due on accounts stated.

Plea, setting out verbatim a deed under s. 192 of the Bankruptcy Act, 1861, entered into between the defendant of the first part, two trustees of the second part, and all the creditors of the defendant who would be entitled to prove in bankruptcy, of the third part, whereby the defendant absolutely assigned the whole of his property and estate of whatever kind to the trustees, on various trusts, for the benefit of his creditors; and whereby it was provided, amongst other things, 1, that the estate in the trustees' hands should be charged primarily with the expenses of investigating the defendant's affairs, of preparing, executing, stamping, and registering the deed, and of *procuring the signatures or assents of the creditors thereto*; and 2, that the trustees should be empowered "from time to time to determine the amount of dividend which should from time to time be declared and paid out of the moneys in hand to and among the said creditors, in respect of their respective debts, and to pay such dividends *at such place and in such manner as they should think fit.*" Averment of performance of all conditions necessary to make the deed as binding on all the creditors of the defendant, including the plaintiff, as though they had executed it.

Demurrer and joinder.

1867

JACOBSON v. LAMERT.

Quain, Q.C., in support of the demurrer. First, it is unreasonable to charge the expenses of obtaining the creditors' assents upon the funds which would otherwise be available for distribution without deduction. The effect of such a provision may possibly be to swallow up the whole estate.

[MARTIN, B. The debtor by this deed has stripped himself of his whole property. That being so, I see nothing unreasonable in the clause objected to.]

It is too extensive in its operation. Secondly, the discretion vested in the trustees is too large. Not only are they to determine the amount of dividend, but they may pay it to each creditor whenever and wherever they please. They might choose, for example, to insist on paying an English creditor in New York.

[KELLY, C.B. We ought to assume that the trustees chosen are persons in whom the creditors have just ground for confidence, and that they will discharge their duties with propriety and discretion.]

Coleridge, Q.C. (*H. James* with him), contrà, was not called upon.

THE COURT (Kelly, C.B., and Martin, B.) held both the provisions objected to to be reasonable, and gave judgment for the defendant.

Judgment for the defendant.

Attorney for plaintiff: *Abraham.*
Attorney for defendant: *E. F. Davis.*

1867
June 15.

ROBERTSON *v.* GOSS AND ANOTHER.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Deed of Assignment —Unliquidated Demand—"Creditor."*

A deed under s. 192 of the Bankruptcy Act, 1861, does not bind one who has a claim for unliquidated damages against the debtor, and whose damages have not been assessed under s. 153.

Sharland v. *Spence* (Law Rep. 2 C. P. 456) followed.

DECLARATION, claiming damages for not delivering yarns.

Plea, a deed under s. 192 of the Bankruptcy Act, 1861, made between the defendants (the debtors), a trustee, and the creditors of the defendants, by which the debtors assigned all their property to the trustee for the benefit of their creditors, and the creditors released the debtors from (inter alia) all "claims and demands" for or on account of "the debts, claims, or demands" of the creditors "now due or owing from the said debtors."

Demurrer and joinder.

May 1. *Coxon*, in support of the demurrer, having cited *Hoggarth* v. *Taylor* (1), the Court called upon

Holker to support the plea. The case of *Hoggarth* v. *Taylor* (1) proceeded merely upon the words of the deed, which were not wide enough to cover unliquidated demands; but the words here are clearly large enough, if such claims can be barred at all by a composition deed as against a non-assenting creditor. That creditors with unliquidated demands are included in the term "creditor" in the Bankruptcy Act, 1861, is clearly decided by *Wood* v. *De Mattos* (2); and the earlier case of *Ex parte Mendel* (3), and the later case of *In re Penton* (4), agreeing with that decision, shew that s. 153 applies to the case of composition deeds, and that such creditors can come in and prove under a deed in the manner there pointed out. But, if so, they must be bound by s. 192, although they may be at liberty to pursue their remedy by action if the debtor does not choose to plead the deed, and, by doing so, may disable themselves from taking advantage of s. 153, as in

(1) Ante, p. 105.
(2) Law Rep. 1 Ex. 91.
(3) 33 L. J. (Bank.) 14.
(4) Law Rep. 1 Ch. 158.

the case of *In re Penton.* (1) This being the meaning of the word "creditor" in the act, the meaning must be taken to be the same in deeds intended to take effect under the act, unless something appears to restrain that construction. In *Hoggarth* v. *Taylor* (2) there was such a circumstance; for promissory notes were there to be given to all the creditors at once, as is noticed by Kelly, C.B., in his judgment (3), which implied that the sum for which they were to be given was already ascertained. But there is nothing here to raise such an inference; the word must, therefore, have its full force, and the release will discharge the debtor. He also referred to ss. 144 and 197 of the act.

Coxon, in reply. By s. 197, the bankruptcy provisions of the act are applied to creditors in case of a deed, in the same manner as if "the creditors had proved in a bankruptcy." But that section must be intended to include and bind all those who are bound as creditors under s. 192. This, therefore, shews that only those are intended to be affected by the deed who are in the same position as creditors who have proved. Now, s. 153 is not imperative; it only says "it shall be lawful for the Court" to direct the damages for the bankrupt's breach of contract to be assessed; and until this is done the party entitled to sue is not a creditor; he cannot prove his debt, nor act as creditor in the bankruptcy; and if his claim is never assessed the discharge of the bankrupt is no bar to his action, since he never could have proved under the bankruptcy. It follows, therefore, that the plaintiff here, who has never had his damages assessed, is not a "creditor," nor bound by the deed, although he might possibly have made himself so by resorting to s. 153. He also contended that the words of the deed shewed that a more restricted meaning was intended.

Cur. adv. vult. (4)

June 17. The judgment of the Court (Kelly, C.B., Bramwell, Channell, and Pigott, BB.) was delivered by

KELLY, C.B. This is a demurrer to a plea. The declaration

(1) Law Rep. 1 Ch. 158.
(2) Ante, p. 105.
(3) Ante, p. 107.
(4) Between the argument and the judgment the case of *Sharland* v. *Spence* (Law Rep. 2 C. P. 456) was decided.

1867

ROBERTSON v. GOSS.

alleges that the defendants contracted to deliver to the plaintiff some yarns, and did not deliver them, and claims damages.

The plea is founded upon a composition deed, made according to the provisions of the Bankruptcy Act, 1861, ss. 192—198. *Wood* v. *De Mattos*, in the Exchequer Chamber (1), decides that a deed of this nature may provide for claims to unliquidated damages, and that persons having such claims may be creditors within these sections of the Bankruptcy Act, and may elect to come in and entitle themselves to have the amount of their demands ascertained under s. 153, and then to claim the benefit of the deed in respect of such amount; and the decision of Lord Cranworth in *In re Penton* (2) is to the same effect. But Lord Cranworth likewise held in that case that such a creditor was not bound to come in under the deed, but might sue for damages and proceed to judgment. In *Hoggarth* v. *Taylor* (3) it was held in this Court that such a deed is no defence to an action, where the plaintiff thinks fit to sue for unliquidated damages; and the Court of Common Pleas, upon the authority of that case, decided, in last Easter Term, in *Sharland* v. *Spence* (4), that such a deed cannot be set up as a defence to an action for unliquidated damages, unless the amount has been ascertained under the 153rd section, and the plaintiff has elected to take the benefit of the deed. This plea, therefore, is no answer to the action, and the plaintiff is entitled to judgment.

Judgment for the plaintiff.

Attorney for plaintiff: *W. A. Holcombe.*
Attorneys for defendants: *Pritchard & Englefield.*

(1) Law Rep. 1 Ex. 91. (3) Ante, p. 105.
(2) Law Rep. 1 Ch. 158. (4) Law Rep. 2 C. P. 456.

PHILLIPS AND OTHERS *v.* THE COMMISSIONERS OF INLAND REVENUE.

1867
June 15.

Stamp Act (13 & 14 *Vict. c.* 97), *sch. tit. Conveyance—Partnership, dissolution of—Conveyance by retiring Partner.*

On a dissolution of partnership a deed was executed, by which, after reciting that it had been agreed that the share of the retiring partner (Sir G. R. P.) in the real assets of the firm should be taken by the continuing partners, and that he should be allowed in account the sum of 17,313*l.* as an equivalent for the value of his share; the retiring partner, in consideration of the sum of 17,313*l.*, "part of the moneys and assets of the said dissolved co-partnership to the said Sir G. R. P. so allowed in account, appropriated, and paid as aforesaid," conveyed his share of the real assets to the continuing partners:—

Held, that the indenture was liable to ad valorem stamp duty, as a conveyance upon a sale within the meaning of 13 & 14 Vict. c. 97, sch. tit. Conveyance.

CASE stated under 13 & 14 Vict. c. 97, by the Commissioners of Inland Revenue, at the request of Mark Phillips and others, on appeal against their decision, requiring a certain indenture to be stamped with an ad valorem duty as a conveyance upon a sale, under 13 & 14 Vict. c. 97, and 28 & 29 Vict. c. 96, s. 1; the question for the Court being, whether the indenture was so chargeable. The indenture in question was made on the retirement from the appellants' firm of Sir George Richard Phillips, one of its members. It recited that an account had been taken of the assets and liabilities of the partnership, and of the shares of the partners; and that it had been agreed that all the share and interest of the retiring partner in the real assets of the partnership should be appropriated to and taken by the other partners; and that there should be allowed in account, and appropriated and paid to him out of the money and assets of the late co-partnership, other than real assets, the sum of 17,313*l.*, as an equivalent to the computed value of his share in the real assets. And "in consideration of the said sum of 17,313*l.*, part of the money and assets of the said dissolved co-partnership, to the said Sir G. R. Phillips so allowed in account, and appropriated and paid as aforesaid," Sir G. R. Phillips conveyed all his share in the real assets of the firm to the remaining partners. The only difference relied upon between the present deed and that adjudicated upon in *Christie*

1867

PHILLIPS v. COMMISSIONERS OF INLAND REVENUE.

v. *Commissioners of Inland Revenue* (1), was, that the consideration was here expressed to be part of the partnership assets; and on this ground it was contended that, notwithstanding that case, the present deed would only be taken to be a deed of partition.

Manisty, Q.C., for the appellants, contended that both in form and substance this was only a partition.

The Solicitor General (*Sir J. B. Karslake*) (*Hannen* with him), for the Crown, was not called upon.

THE COURT (Kelly, C.B., Martin and Channell, BB.) held that the case was not distinguishable from that of *Christie* v. *Commissioners of Inland Revenue.* (1)

Judgment for the respondents.

Attorneys for appellants: *Williamson, Hill, & Co.*

Attorney for respondents: *Solicitor to the Commissioners of Inland Revenue.*

June 5.

REDWAY *v.* SWEETING.

Mutual Insurance Society—Liability of Individual Shareholder—Remedy in Case of Loss—Cross Demurrers—Right to begin.

In the Court of Exchequer, when there are cross demurrers to be argued, the party demurring first has the right to begin.

Hill v. *Cowdery* (1 H. & N. 360) adhered to.

The plaintiff and defendant were members of a mutual insurance society, and the defendant, with the other members of the society, were insured to the plaintiff upon his ship in a sum specified in a policy of insurance, subscribed by the defendant and the other members of the society. Annexed to the policy, and forming part of it, were the following, amongst other rules:—

The members of this association shall severally and respectively, and not jointly or in partnership, or the one for the other of them, but each only in his own name, insure each other's ships from the date of entry of each respectively until noon of the 20th of February then next, and from that time until noon of the 20th of February in the next succeeding year, and so on from year to year, against all losses, &c.

[A rule nominating managers, and providing that they should meet once a quarter to audit accounts and settle claims.]

---

(1) Ante, p. 46.

In order more readily to provide for the payment of claims, the managers are hereby empowered to levy contribution of one-fourth part of the fixed annual premium, which shall be drawn for [in a prescribed manner]. Provided always, that if the gross amount of losses and expenses during the year shall happen to exceed the amount of the premiums so realized, the deficiency shall be made good by an additional percentage, which the members, during the year, shall be respectively bound to contribute and pay to the managers; but should the premiums so realized exceed the losses, &c., then the surplus shall be returned in proportion to the amount of premium respectively contributed by them.

The managers' drafts on the members of the association for their proportion of the annual fixed premium, and for any additional percentage, shall be duly accepted, and punctually paid when due; and if any member shall neglect to accept any such drafts, or to pay his contributions thereto, on receiving notice from the managers, his respective ship or ships shall immediately cease to be insured in this association, and he shall thenceforth forfeit all claims in respect of any loss, &c., under his policy; but he shall still remain liable to contribute to all losses and averages which may occur during the period for which any such policy was originally granted, and the amount due from any defaulting member shall be considered as a debt due to the managers, and shall be recoverable by them at law.

To a declaration setting out the policy and rules, and containing the usual averments of loss, &c., the defendant pleaded, first, that he had paid the percentage required of him by the managers; and secondly, that the action was commenced before the managers' drafts on him were due:—

Held, that, on the true construction of the rules and under the circumstances as they appeared on the record, the defendant was not individually liable.

DECLARATION on a policy of insurance on the ship *Orion*, and that it was mutually agreed that certain rules annexed thereto should form part of that policy; and that those rules, so far as material, were as follows:—

1. That the members of this association shall severally and respectively, and not jointly or in partnership, or the one for the other of them, but each only in his own name, insure each other's ships from noon of the 20th of February, 1865, or from the date of entry of each respectively, until noon of the 20th of February then next, and from that time until noon of the 20th February in the next succeeding year, and so on from year to year . . . against all losses &c. sustained by their respective ships . . . except as hereinafter excepted.

4. That the committee for superintending the affairs of this association do consist of the following gentlemen [here follow the names], who shall meet once a quarter, or oftener, if required, to audit the accounts and settle claims. No member of the com-

1867

REDWAY v. SWEETING.

mittee shall act as such in the settlement of his own loss or average.

5. That in order more readily to provide for the payment of claims as they may become due, the managers shall be entitled, and are hereby empowered, to levy contribution of one-fourth part of the fixed annual premium, which shall be drawn for at two months' date, from the 1st of March, June, September, and December, in each year, such premiums to form a fund for that purpose. Members entering their ships after the 20th of February shall only be charged premiums from the date of entry: Provided always, that if the gross amount of losses and expenses during the year shall happen to exceed the amount of premiums so realized, the deficiency shall be made good by an additional percentage, which the members, during the year, shall be respectively bound to contribute and pay to the managers; but should the premiums so realized exceed the losses and expenses incurred, then the surplus shall be returned in proportion to the amount of premium respectively contributed by them.

6. That the managers' drafts on the members of the association for their proportion of the annual fixed premium, and for any additional percentage, shall be duly accepted, and punctually paid when due; and if any member shall neglect or refuse to accept any such drafts, or to pay his contributions thereto on receiving notice from the managers, his respective ship or ships shall immediately cease to be insured in or by this association, and he shall thenceforth forfeit all claims for or in respect of any loss or average under his policy or policies effected therein; but he shall still remain liable to contribute to all losses and averages which may occur during the period for which any such policy was originally granted, and the amount due from any defaulting member shall be considered as a debt due to the managers, and be recoverable by them at law.

Averments: that, in consideration of a premium paid by the plaintiff, the members of the society severally and respectively subscribed the policy, and were insured to the plaintiff in the sum of 500*l.* on his ship, every member bearing his equal proportion; that the defendant was a member of the association and subscribed the policy; that his proportion of the said sum was 50*l.*; that the

plaintiff was interested in the subject-matter of the policy, and the same was lost, whereby the plaintiff became entitled to be paid by the defendant the sum of 50*l.*, yet the defendant has not paid the same.

Demurrer and joinder.

Pleas—1. That the gross amount of losses in the year, in the declaration mentioned, exceeded the amount of all premiums realized, as mentioned in rule 5, by the whole amount of the sum insured by the plaintiff, of which the plaintiff had notice, and thereupon the managers called on the defendant to contribute to them such additional percentage as in rule 5 mentioned, towards making good the deficiency, and that the defendant had, in pursuance thereof, contributed the said additional percentage to the managers, in accordance with the said rules.

2. Repeating the averments in the first plea, except the averment that the defendant had contributed the said additional percentage, and instead thereof saying that the action was commenced before the drafts of the managers mentioned in rule 6 had become due.

Demurrers to both pleas and joinder.

Brown, Q.C. (*White* with him), in support of the demurrers to the pleas, was stopped at the commencement of his argument by the Court. They stated that, by their practice, where there are cross demurrers, the party demurring first is entitled to begin: see *Hill* v. *Cowdery*. (1)

Brown, Q.C., called attention to the circumstance that in the Courts of Queen Bench and Common Pleas the plaintiff was held entitled to begin. (2)

The Court intimated that they would adhere to their own previous rule on the subject, and accordingly called on

Mellish, Q.C. (*Beresford* with him), to support the demurrer to the declaration, and also to support the pleas. The plaintiff should have sued the managers. He had no remedy against the defendant, whose only duty was to pay the money due from him to the managers under rule 5, or to accept and meet the drafts of the managers under rule 6. To have each mutual insurer

(1) 1 H. & N. 360.

(2) See *Reg.* v. *Churchward*, and the cases therein cited, Law Rep. 1 Q. B. at pp. 183, 184.

1867

REDWAY v. SWEETING.

individually liable would be contrary to the true construction of the rules, and would lead to the destruction of the association.

Brown, Q.C., contrà, contended that the plaintiff was entitled to sue the defendant, and was not bound in the first instance to have recourse to the managers. Suppose the managers were to misappropriate or steal the society's funds, or were to become, from any cause, unable to pay a loss, the plaintiff would, under the rules, be able to fall back on an individual member.

Mellish, Q.C., was not called upon to reply.

KELLY, C.B. This case seems to me to be free from doubt. The plaintiff and defendant, both being members of this insurance club, have entered into the contract set forth in the declaration, and the question for us is, what that contract is. By the first rule we find that each member "insures" the ships of the others, and we must therefore inquire to what extent the defendant did "insure" the plaintiff's ship. For that purpose we have to refer to the 5th and 6th rules [the learned judge read the rules]. The defendant's liability under these rules was to give acceptances for the sums he was bound to contribute, and to pay them when due; and there is no allegation that he has failed in either respect. The first plea, indeed, shews that he has actually accepted and paid bills to the whole amount of his liabilities. The pleadings, therefore, disclose no breach of the legal contract entered into by him with the plaintiff.

It is suggested, however, that in truth the contract was to make good the insurance, in any event, to the plaintiff. That is, that supposing from any cause the managers failed to pay him, the defendant must pay. The case was put of an embezzlement or an insolvency on their part. If such a contingency were to occur, the loss would probably be considered a general loss, to be made good by an equal contribution from the several members of the society. But no question of that sort arises here. This is a simple case of an action on the policy. The defendant is liable, but it is expressly provided that he is to meet his liability in a particular way. There is no allegation that he has failed to do so, and he is therefore entitled to our judgment.

MARTIN, B. I am of the same opinion. It is contrary to the spirit and wording of the 5th rule, and to the plain intention of the parties, that one member of the society should bring an action against another, except, possibly, under some circumstances entirely different from those of the present case. The defendant is therefore, in my opinion, entitled to our judgment.

BRAMWELL, B. I am also of opinion that the defendant is entitled on these pleadings to our judgment. The allegation in the declaration is, that the defendant has not paid the sum he was bound to pay according to the tenor of the policy, and that all conditions have happened to entitle the plaintiff to recover that sum. The defendant, however, says, in reply to this allegation, "Let me have made the contract with whom I may, I have performed it." And I think that answer is a good one. Whether the plaintiff has a remedy against the managers, or the managers against the defendant, or the plaintiff, in some state of circumstances, against the defendant, I do not at present inquire. The Court of Common Pleas have now sub judice the question of whether the managers can maintain an action for these contributions. However that may be decided, I think that in this case our judgment must be for the defendant.

CHANNELL, B., concurred.

Judgment for the defendant.

Attorney for plaintiff: *Thomas Baker, jun.*
Attorney for defendant: *J. F. Elmslie.*

1867
June 12.

OLDIS *v.* ARMSTON.

Debtor and Creditor—Deed under the Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Action by non-assenting Creditor—Unreasonable provision—Plea shewing on its face that an unreasonable provision can have no operation.*

To an action by a non-assenting creditor, the debtor pleaded a deed under the Bankruptcy Act, 1861, containing an unreasonable provision. The plea averred facts shewing that at the time of the registration of the deed, the unreasonable provision could have no operation against non-assenting creditors :—

Held, a bad plea, notwithstanding the averment.

DECLARATION on the common money counts.

Plea setting out the provisions of a deed under s. 192 of the Bankruptcy Act, 1861, between the defendant (the debtor) and all his several creditors, containing a release in the usual terms, in consideration of the payment to them by him of a composition of 2*s.* 6*d.* in the pound, and the following, amongst other clauses :—"They, the said several creditors, do severally, and not the one for the other of them, or the acts, deeds, or defaults of the others, or any other of them (but as to secured creditors without prejudice), covenant and agree to, and with, the said debtor, his executors, &c., immediately after payment of the said composition, to hold harmless and indemnify the said debtor, his executors, &c., of and from the payment of any sum of money, costs, charges, or expenses, in or about or relating to any bill of exchange, promissory note, or other security or securities, which he may have given to them the said creditors respectively, or on account of their said several debts respectively, or any part thereof." Averment of performance of all conditions necessary to make the deed as binding on the plaintiff as though he had been a party thereto, and that at the time of the making and registration of the said deed as aforesaid no creditor of the defendant who had not before the registration of the said deed as aforesaid, in writing assented to or approved of the said deed, and executed the same as a creditor, and no creditor of the defendant whosoever, and no person or persons whosoever, had any claim or demand against the defendant other than or save and except for a debt within the meaning and operation of the 192nd section of the Bankruptcy Act, 1861 ; nor had any such creditor or person, nor has he since had, nor can he

1867

OLDIS v. ARMSTON.

hereafter have, any claim or demand against the defendant, for or in respect of any sum of money, costs, charges, or expenses, in, about, or relating to, any bill of exchange, promissory note, or other security or securities, given by the defendant to his creditors respectively, or to any or either of them, for, or on account, or in respect, of any debt to which such deed relates; nor had nor has the defendant given to any or either of his creditors (other than to certain creditors who, before the registration of the said deed, duly assented in writing to and executed the same) any such bill of exchange, promissory note, or other security, as in the said deed mentioned.

Demurrer and joinder.

Murphy, in support of the demurrer. The covenant to indemnify the debtor against outstanding bills, &c., is unreasonable, according to the decisions in *Woods* v. *Foote* (1) and *Ingelbach* v. *Nichols*. (2) The deed therefore is void, and cannot be pleaded in bar to an action by a non-assenting creditor; and the averment in the plea that there were no bills on which the objectionable clause could operate at the time of the registration of the deed, does not make the plea good. A deed under s. 192 of the Bankruptcy Act, 1861, must be good in itself, in order to be capable of being used as a defence.

The Court called on

Lucius Kelly, contrà. First, the deed is reasonable. It is distinguishable from the cases cited, because the covenant of each creditor to indemnify, is confined to bills given to the particular creditor covenanting.

[THE COURT (Kelly, C.B., and Martin, B.) intimated that they considered the authorities cited shewed the clause to be unreasonable.]

Secondly, assuming the deed, looked at alone, to be void, the plea is nevertheless good. The averment shews that when the deed was registered the objectionable clause could have no operation on non-assenting creditors. At the time of registration none but executing creditors held bills, and non-assenting creditors therefore could by no possibility be prejudiced.

(1) 1 H. & C. 841; 32 L. J. (Ex.) 199. (2) 14 C. B. (N.S.) 85.

1867

OLDIS v. ARMSTON.

[KELLY, C.B. The effect of the averment, according to your contention, is to strike the unreasonable clause out of the deed.]

That is so. A clause which, at the date of registration, cannot operate quoad non-assenting creditors, is one to which they at any rate cannot object. In *Balden* v. *Pell* (1) Blackburn, J., in reference to a covenant in the deed there pleaded, which was made absolutely binding on executing creditors, whether the deed could take effect under the Bankruptcy Act, 1861, s. 192, or not, and which was represented as unreasonable, says (2): "Is that an objection in the mouth of a non-assenting creditor? What difference does it make to him if a creditor who signs takes upon himself to incur a liability?" The same question may be asked here. [He also cited *Hidson* v. *Barclay* (3); *Keyes* v. *Elkins* (4); *Johnson* v. *Barratt* (5); *Woods* v. *De Mattos* (6); *Thompson* v. *Knight.* (7)]

Murphy was not called upon to reply.

THE COURT (Kelly, C.B., and Martin, B.) were of opinion that a plea to an action by a non-assenting creditor, setting up as a defence a deed under the Bankruptcy Act, 1861, s. 192, containing an unreasonable clause, could not be made good by an averment of extrinsic circumstances tending to shew that the clause could not prejudice the plaintiff. They considered that a deed to be capable of being pleaded must be good in itself, and therefore held the plea bad.

Judgment for the plaintiff.

Attorneys for plaintiff: *Lumley & Lumley.*

Attorneys for defendant: *Bannister & Robinson.*

(1) 5 B. & S. 213; 33 L. J. (Q.B.) 200.

(2) 5 B. & S. at p. 228.

(3) 3 H. & C. 361; 34 L.J. (Ex.) 217.

(4) 5 B. & S. 240; 34 L. J. (Q.B.) 25.

(5) Law Rep. 1 Ex. 65.

(6) Law Rep. 1 Ex. 91.

(7) Law Rep. 2 Ex. 42.

END OF TRINITY TERM.

INDEX.

PAGE

ACKNOWLEDGMENT under Statute of Limitations 153
See LIMITATIONS, STATUTE OF.

ACT OF BANKRUPTCY, what amounts to 304
See BILL OF SALE.

ACTION—*Maliciously signing Judgment—Malicious Arrest—Estoppel—Judgment—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76) *s.* 27.] A. having issued a writ of summons against B., specially indorsed for 28*l.*, B., without appearing to the writ, paid 10*l.* to A., on account of the debt. A. afterwards, under the Common Law Procedure Act, 1852, s. 27, signed judgment for default of appearance, for the full amount of 28*l.* and costs, and issued a ca. sa., indorsed for that amount, under which B. was arrested, and paid the sum demanded. B. having brought an action against A. for maliciously and without probable cause signing judgment and issuing execution:—*Held*, that, whilst the judgment stood for the full amount, it estopped the plaintiff from denying the correctness of the judgment or of the execution.

Quære, whether, if the judgment had been rectified, by reducing it to the amount for which it ought to have been signed, as in *Hodges* v. *Callaghan* (2 C. B. (N.S.) 306), the action would have been maintainable?

HUFFER *v.* ALLEN AND ANOTHER 15

2. ———, where commenced in the name of a dead man, his representatives cannot be substituted as plaintiffs 54
See PRACTICE. 2.

3. ——— for obstructing highway 316
See HIGHWAY.

4. ——— for calls, plea to 324
See COMPANY. 2.

ADDITION, effect of material, to deed 189
See BANKRUPTCY ACT, 1861. 8.

AFFIDAVIT of debt for obtaining a judge's order for holding a defendant to bail, form of 34
See PRACTICE. 1.

AGENT, effect of fraudulent misrepresentation by, acting in the course of his business 259
See PRINCIPAL AND AGENT. 2.

———, effect of signature of bill of lading by 267
See SHIP AND SHIPPING. 4.

AGREEMENT: *See* CONTRACT.

PAGE

AMENDMENT, where an action is commenced in the name of a dead man, his representatives cannot be substituted as plaintiffs 54
See PRACTICE. 2.

ARBITRATION, what amounts to a reference to, within s. 13 of the Common Law Procedure Act, 1854 72
See VENDOR AND PURCHASER.

ARBITRATION CLAUSE in fire policy, construction of 237
See CONSTRUCTION. 5.

ARBITRATOR: *See* ARBITRATION.

ASSIGNMENT of all their rolling stock by railway company, effect of .. 225
See RAILWAY COMPANY. 2.

ATLANTIC CABLE, construction of policy of insurance upon 139
See MARINE INSURANCE. 1.

ATTORNEY—*Compromise—Retainer—Negligence.*] If the plaintiff in an action continues the authority of his attorney after judgment, by allowing him to proceed to obtain satisfaction, the attorney retains the power to bind his client by a compromise.
BUTLER *v.* KNIGHT 109

2. ———— has no power to bind his partner by a post-dated cheque 163
See PARTNERSHIP.

3. ———— undertaking by, for amount of debt and costs, effect of .. 249
See BANKRUPTCY ACT, 1861. 10.

AUTHORITY of agent 82
See PRINCIPAL AND AGENT. 1.

———— of general manager of railway company to bind company 228
See RAILWAY COMPANY. 3.

BANKRUPT: *See* BANKRUPTCY ACT, 1861.

BANKRUPT LAW CONSOLIDATION ACT, 1849 (12 & 13 *Vict.* c. 106), s. 125—*Reputed Ownership—Custom.*] Where a custom exists for the buyer to leave goods bought in the hands of the seller, and is so notorious as to be practically known to all persons dealing with the seller in his business, goods so left in the hands of the seller for a time not longer than is clearly within the custom, do not on the bankruptcy of the seller pass to his assignees, under s. 125 of the Bankrupt Law Consolidation Act, 1849.
PRIESTLEY *v.* PRATT AND ANOTHER 101

2. ————————————, s. 86—*Trader-Debtor Summons—Costs—Construction.*] Where a creditor, having taken out a trader-debtor summons against his debtor, and filed an affidavit of debt under s. 78 of 12 & 13 Vict. c. 106, recovers in an action for the debt less than the amount sworn to in the affidavit, and the defendant applies to the Court for an order for costs under s. 86, the Court, on being satisfied of the absence of reasonable and probable cause for swearing to the amount in the affidavit, is bound to make the order, no discretionary power to withhold it being given by the section.
FALCONAR *v.* MCKENZIE 248

3. ————————————, s. 67 304
See BILL OF SALE.

BANKRUPTCY: *See* BANKRUPTCY ACT, 1861.

BANKRUPTCY ACT, 1861 (24 & 25 *Vict.* c. 134), s. 192—*Deed of Arrangement—Debtor and Creditor—Inequality—Release—Tender of Composition—Scheduled Creditors.*] A deed of arrangement, under

PAGE

s. 192 of the Bankruptcy Act, 1861, between the debtor of the first part, J. D., a surety, of the second part, and the several persons creditors of the debtor whose names were thereunto subscribed and all other the creditors of the debtor of the third part, after reciting that the defendant was indebted "to the said several creditors in the several sums of money set opposite to their respective names in the schedule" thereunder written, and that it had been agreed by the requisite majority in number and value of the "said several creditors" to accept the composition and security therein expressed in full satisfaction of their respective debts, witnessed that, in consideration of the joint and promissory notes of the debtor and J. D. for the payment of such composition "on the respective sums of money aforesaid," they, the said creditors, parties thereto of the third part, released to the defendant all actions, debts, &c., which they had against him, and accepted the stipulated composition in full satisfaction of the debts and sums due to them "*specified in the schedule;*" and the debtor and J. D. covenanted with each and every of the creditors parties thereto of the third part, to pay the composition "upon their respective debts *as aforesaid*," and to make and deliver to them the notes securing the same:—*Held*, first, that the release in the deed was absolute and unconditional, and not confined to scheduled debts; and, secondly, that there was no inequality in the deed, as on the true construction of it all the creditors were equally entitled to the benefit of the covenants therein contained. [*Affirmed in Ex. Ch. p.* 275, *vide next case inf.*]

TETLEY AND OTHERS *v.* WANLESS 21

2. BANKRUPTCY ACT, 1861, s. 192—*Debtor and Creditor—Inequality—Scheduled Creditors—Release after Action—Pleading—Plea to further Maintenance.*] A deed under s. 192 of the Bankruptcy Act, 1861, between the debtor of the first part, J. D., a surety, of the second part, and the several persons, creditors of the debtor, whose names were thereunto subscribed, and all other the creditors of the debtor, of the third part, after reciting that the defendant was indebted "to the said several creditors in the several sums of money set opposite to their respective names in the schedule" thereunder written, and that it had been agreed by the requisite majority in number and value of the said several creditors to accept the composition and security therein expressed in full satisfaction of their respective debts, witnessed that in consideration of the joint and several promissory notes of the debtor and J. D., for the payment of such composition "on the respective sums of money aforesaid," they, the said creditors, parties thereto of the third part, released to the defendant all actions, suits, debts, claims, and demands, which they had against him, and accepted the stipulated composition in full satisfaction of the debts and sums due to them "specified in the schedule;" and the debtor and J. D. covenanted with each and every of the creditors parties thereto of the third part to pay the composition "upon their respective debts as aforesaid," and to make and deliver to them "the said promissory notes":—*Held*, that there was no inequality in the deed, as on the true construction of it all the creditors, whether their debts were scheduled or not, were equally entitled to the benefit of the covenants therein contained.

To a declaration in debt by non-assenting creditors, the defendant (the debtor) pleaded the above deed, which had been entered into after the commencement of the suit, *generally* to the further maintenance of the action:—*Held*, that the release contained in the deed discharged not only the debt sued for, but also all claims or demands arising therefrom by way of damages for its detention, costs, or otherwise, and that the plea was therefore rightly pleaded generally.

TETLEY AND OTHERS *v.* WANLESS .. .. .. Ex. Ch. 275

PAGE

3. BANKRUPTCY ACT, 1861, s. 198—*Execution.*] After the sheriff had seized under a writ of fi. fa., the execution debtor executed a deed under the Bankruptcy Act, 1861, which was duly registered and gazetted. On an application by the debtor to the Court, the sheriff was, under s. 198 of the act, directed to withdraw.

Marks v. *Hall* (Law Rep. 2 Q. B. 31) followed.

ROGERS *v.* ROBERTS 35

4. ——————————, s. 192—*Deed of Arrangement—Inequality —Trustees' Discretion.*] A deed of arrangement entered into under the Bankruptcy Act, 1861, s. 192, between a debtor, his creditors, and a trustee, provided that the creditors should be paid their composition by instalments at two, four, and six months from the date of the deed. It also contained a clause conferring on the trustee a discretionary power to pay to all creditors whose debts did not exceed 20*l.* the full amount of their composition in one sum at such time or times as he should think fit:—*Held*, that this clause made the deed unequal.

THOMPSON AND ANOTHER *v.* KNIGHT 42

5. ——————————, *Deed under s.* 192—*Debtor and Creditor—"Creditor"—Unliquidated Demand—Release.*] To an action for unliquidated damages for breach of contract by a wrongful dismissal of the plaintiff from the defendant's service, the defendant pleaded a deed under the Bankruptcy Act, 1861, s. 192, between the defendant (the debtor), two sureties, and the creditors of the defendant, by which the debtor and sureties covenanted to pay a certain composition in a specified time, the payment to be secured by joint and several promissory notes. In consideration of the premises, the creditors released the debtor "from their respective debts, and all claims and demands in respect thereof." The plaintiff did not assent to or approve of the deed:—*Held*, that the plea was no answer to the action, the claim of the plaintiff being for unliquidated damages.

Woods v. *De Mattos* (Law Rep. 1 Ex. 91) distinguished.

HOGGARTH *v.* TAYLOR 105

6. ——————————, s. 198—*Protection—Letter of Licence—Unreasonable Deed—Construction.*] A letter of licence is not a deed within the Bankruptcy Act, 1861.

A deed, executed by the defendant as debtor, was assented to by the statutory number of creditors, and registered with the formalities necessary for the registration of a deed under s. 192 of the Bankruptcy Act, 1861. After a recital that the debtor was indebted to his creditors "in several sums of money," the creditors granted him a letter of licence for twelve months, and covenanted not to sue him during that time, and that to any action or proceeding on their debts during that time the deed might be pleaded as a release and discharge. The deed contained no schedule of creditors or of debts, it provided no composition, nor contained any covenant for payment of debts, nor conveyed any property, nor made any provisions with respect to the carrying on of the debtor's affairs. The defendant having been arrested at the suit of a non-assenting creditor:—*Held*, that the certificate of registration was no protection under s. 198, on the ground (per Kelly, C.B., and Martin, B.) that, as a deed to bind non-assenting creditors, the deed was unreasonable; and (per Martin, Channell, and Pigott, BB.) that it was not a deed of such a kind as was described by either s. 192 or s. 194 of the Bankruptcy Act, 1861.

LATHAM *v.* LAFONE 115

7. ——————————, s. 192—*Release—Action on Judgment—Time for Pleading—Practice.*] In a former action by the plaintiff against the defendant, the defendant pleaded never indebted, but after-

PAGE

wards withdrew his plea, on an agreement that judgment should not be signed before the 8th of May. On the 7th of May, the defendant registered a deed under the Bankruptcy Act, 1861, s. 192, containing a release from his creditors, but he did not plead it in the action. On the 8th, the plaintiff signed judgment. In an action brought on the judgment:—*Held*, that the interval between the registration of the deed and the signing of judgment did not give the defendant such an opportunity of pleading the deed as to disable him from availing himself of it in the second action. *Held*, also, that the agreement, under which the plea of never indebted was withdrawn, precluded the defendant from pleading any other plea in the former action, and that he might, therefore, now avail himself of the deed.

Quære, whether, supposing the defendant had had the opportunity and power of pleading the deed, and had neglected to do so, he could now avail himself of it?

BRAUN *v.* WELLER 183

8. BANKRUPTCY ACT, 1861—*Material Addition to Deed after Registration—Schedule of Creditors.*] A deed was registered under s. 192 of the Bankruptcy Act, 1861, which was expressed to be made between the debtor, a surety, and scheduled creditors. At the time of registration no schedule was annexed, but a schedule was afterwards added by the debtor:—*Held*, that the addition of the schedule vitiated the deed.

SELLIN *v.* PRICE 189

9. ———————————, *Deed containing Release not pleaded—Estoppel—Effect of* s. 198 *in Preventing process from being available.*] The defendant, having had the opportunity to plead to an action a deed under s. 192 of the Bankruptcy Act, 1861, omitted to do so, and judgment was recovered against him; a fi. fa. being afterwards levied on his goods, he sought to avail himself of the protection of s. 198, which enacts that, after notice of the registration of such a deed, process shall not be available:—*Held*, per Kelly, C.B., and Pigott, B., that he could do so; per Bramwell and Channell, BB., that he could not.

Whitmore v. *Wakerly* (3 H. & C. 538), and *Hartley* v. *Mare* (19 C. B. (N.S.) 85), considered.

STAFFORDSHIRE BANKING COMPANY, LIMITED *v.* EMMOTT .. 208

10. ———————————, *Execution—Undertaking by Attorney.*] The plaintiff issued execution, after notice that a composition deed under s. 192 of the Bankruptcy Act, 1861, was about to be registered by the defendant; the defendant's attorney gave notice of the same fact to the sheriff's officer, who withdrew on having the attorney's undertaking for the amount of the debt and costs, after refusing to withdraw on any other terms. At the time the undertaking was given the deed was in fact registered, and contained a release of all the creditors' "claims and demands." The defendant having paid to the sheriff the amount of the undertaking under protest, and the sheriff having paid the same into court, the defendant moved to have the money paid out to him:—*Held*, that the defendant was entitled to the money, inasmuch as the money represented the proceeds of the execution, and the plaintiff was not, at the time the undertaking was given, in a position in which he could have derived any benefit from the execution if it had been proceeded with.

MILNER *v.* RAWLINGS 249

11. ———————————, *Debtor and Creditor—Parties to Deed—Construction.*] A deed was made under s. 192 of the Bankruptcy Act, 1861, between "the several persons whose names are subscribed and seals affixed, &c., creditors of S. G. (the debtor), *on behalf of them-*

PAGE

selves and all and every other the creditors of S. G. of the first part, and S. G. of the second part." It contained a covenant by the debtor with all his creditors for payment of a composition on all his debts, and a release by the parties of the first part:—*Held*, that the deed was to be read as making all the creditors parties, and that it was therefore valid.

M'Laren v. *Baxter* (Law Rep. 2 C. P. 559) approved and followed.

ISAACS *v.* GREEN 352

12. BANKRUPTCY ACT, 1861—*Debtor and Creditor—Deed of Assignment—Unreasonableness—Trustees' Discretion—Charging Expenses of obtaining Creditors' Assents on Estate.*] A deed under the Bankruptcy Act, 1861, s. 192, whereby the debtor assigned his whole property to trustees for the benefit of his creditors, contained the following amongst other clauses:—1, a clause charging his property in the trustees' hands primarily with the expenses of obtaining the creditors' assents to the deed; and 2, a clause empowering the trustees from time to time to determine the dividends payable to the creditors, and to pay the same "at such place and in such manner as they should think fit:"—*Held*, that both these provisions were reasonable.

JACOBSON *v.* LAMERT 394

13. ———————, *Deed of Assignment—Unliquidated Demand "Creditor."*] A deed under s. 192 of the Bankruptcy Act, 1861, does not bind one who has a claim for unliquidated damages against the debtor, and whose damages have not been assessed under s. 153.

Sharland v. *Spence* (Law Rep. 2 C. P. 456) followed.

ROBERTSON *v.* GOSS AND ANOTHER 396

14. ———————, *Debtor and Creditor—Action by non-assenting Creditor—Unreasonable Provision—Plea shewing on its Face that an unreasonable Provision can have no operation.*] To an action by a non-assenting creditor, the debtor pleaded a deed under the Bankruptcy Act, 1861, containing an unreasonable provision. The plea averred facts shewing that at the time of the registration of the deed, the unreasonable provision could have no operation against non-assenting creditors:—*Held*, a bad plea, notwithstanding the averment.

OLDIS *v.* ARMSTON 406

BILL OF EXCHANGE—*Failure of Consideration—Satisfaction of Bill—Bills of Exchange Act*, 1855 (18 & 19 *Vict. c.* 67)—*Leave to appear and plead—Practice.*] In an action commenced by writ of summons under the Bills of Exchange Act, 1855, leave to appear and plead will be given whenever there is an apparently real defence, and the condition of bringing the money into Court, or finding security, will only be imposed where there is reason to doubt its *bona fides*.

Where, in an action by an indorsee, leave has been given on affidavits shewing a good defence as between the original parties to the bill, and stating circumstances which raise the inference that the plaintiff is not a holder for value, or is for any other reason liable to be opposed by the same defence, affidavits in answer will be received to contradict that inference, and will, if clear and cogent, be ground for rescinding the leave.

In an action by the indorsee of a bill of exchange against the acceptor, a plea stating the satisfaction of the bill by the drawer will not be good unless it shews that the plaintiff is not the lawful holder of the bill.

In such an action a plea stating that the bill was given for goods to be supplied by the drawer, and that only part of the goods were supplied, of which the defendant accepted a part, and that by reason of the non-completion of the contract the part supplied became valueless

PAGE

to him, and also shewing that the plaintiff is not a holder for value, will be good, provided also (per Channell and Pigott, BB.) the value of the goods accepted is shewn to be a definite sum.
AGRA AND MASTERMAN'S BANK, LIMITED *v.* LEIGHTON 56

BILL OF LADING, indorsement of 37
See SHIP AND SHIPPING. 1.

————————, construction of 267
See SHIP AND SHIPPING. 4.

BILL OF SALE—*Agreement to give Bill—Fraudulent Preference—Act of Bankruptcy—Bankrupt Law Consolidation Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 67.] A trader, being indebted to the defendant, gave his acceptance to him for the amount of the debt. Three days before the acceptance was due, he agreed to give the defendant a bill of sale upon all his goods, chattels, and stock-in-trade, in consideration of the defendant taking up the acceptance, and in order to cover any further advance which might be made to him by the defendant. The defendant accordingly took up the acceptance, and afterwards lent an additional sum to the trader. A bill of sale was subsequently executed in pursuance of the agreement, whereby the whole of the trader's personal estate, of which he was then, or should in future, become possessed, was assigned to the defendant, as security for the debt due from the trader to him. Less than twelve months from the date of this bill of sale, but more than twelve months from the date of the agreement to give it, the trader was adjudicated bankrupt. In an action of trover by the assignee in bankruptcy against the defendant for the goods included in the bill of sale:—*Held*, that the bill of sale conferred a good title to them on the defendant as against the plaintiff.
MERCER *v.* PETERSON 304

BILLS OF EXCHANGE ACT, 1855 56
See BILL OF EXCHANGE.

BILLS OF LADING ACT, effect of 267
See SHIP AND SHIPPING. 4.

BLASPHEMY, what amounts to 230
See CONTRACT. 1.

CALLS, plea to action for 324
See COMPANY. 2.

CARGO, mode of measuring 125, 333
See SHIP AND SHIPPING. 2, 3.

CARRIERS, liability of railway companies as common 173
See RAILWAY COMPANY. 1.

CASES:

COLLINS *v.* COLLINS (26 Beav. 306; 28 L.J. (Ch.) 184), followed .. 78
COX *v.* MIDLAND COUNTIES RAILWAY COMPANY (3 Ex. 268), considered 228
EASTERN COUNTIES RAILWAY COMPANY *v.* HAWKES (5 H. L. C. 331), discussed 356
EWART *v.* GRAHAM (7 H. L. C. 331), distinguished 202
HARTLEY *v.* MARE (19 C. B. (N. S.) 85), discussed 208
HILL *v.* COWDERY (1 H. & N. 360), adhered to 400
HODGES *v.* CALLAGHAN (2 C. B. (N. S.) 306), discussed 15
MACGREGOR *v.* DOVER AND DEAL RAILWAY COMPANY (18 Q. B. 618; 22 L. J. (Q. B.) 69), discussed 356

PAGE

CASES (*continued*):

M'LAREN *v.* BAXTER (Law Rep. 2 C. P. 559), approved and followed 352

MARKS *v.* HALL (Law Rep. 2 Q. B. 31), followed 35

MOORE *v.* CAMPBELL (10 Ex. 323), followed 135

PRESTON *v.* LIVERPOOL, &c. RAILWAY COMPANY (5 H. L. C. 605; 25 L. J. (Ch.) 421), discussed 356

SHARLAND *v.* SPENCE (Law Rep. 2 C. P. 456) followed 396

STOCKPORT WATERWORKS COMPANY *v.* POTTER (3 H. & C. 300), considered 1

WHITMORE *v.* WAKERLY (3 H. & C. 538), discussed 208

WOODS *v.* DE MATTOS (Law Rep. 1 Ex. 91), distinguished 105

CHARGE on contingent equitable interest 131
See DEBTOR AND CREDITOR.

CHARGING ORDER, what amounts to an "interest" in shares in a public company, so as to be subject to 131
See DEBTOR AND CREDITOR.

CHARTERPARTY, construction of 125, 333, 335
See SHIP AND SHIPPING. 2, 3, 5.

CHEQUE, an attorney has no power to bind his partner by a post-dated .. 163
See PARTNERSHIP.

COMMON CARRIERS, liability of railway company as 173
See RAILWAY COMPANY. 1.

COMMON LAW PROCEDURE ACT, 1852, s. 27 15
See ACTION. 1.

——————————————— s. 222 54
See PRACTICE. 2.

——————————————— 1854, s. 13, what amounts to a reference to arbitration within the meaning of 72
See VENDOR AND PURCHASER.

COMPANIES CLAUSES CONSOLIDATION ACT, 1845 158
See COMPANY. 1.

COMPANY — *Directors' Bond under Company's Seal — Unauthorized Bond—Construction—Companies Clauses Consolidation Act*, 1845 (8 *Vict. c.* 16).] Directors exercising the powers conferred by the Companies Clauses Consolidation Act, 1845, must act together, and as a board. The prescribed quorum of directors in the defendants' company being three, the secretary affixed the seal of the company to a bond, after having obtained the written authority of two directors at a private interview, and at another private interview the verbal promise of a third to sign the authority. The company being sued upon this bond:—*Held*, that the seal of the company was affixed without lawful authority, and that the company were therefore not liable on the bond.

D'ARCY *v.* THE TAMAR, KIT HILL, AND CARLINGTON RAILWAY COMPANY 158

2. ——————— *Action for Calls—Fraud—Repudiation.*] To an action by a company against a shareholder for calls, the defendant pleaded that he was induced to become a shareholder by the fraud of the plaintiffs, that he had never recognised, since notice of the fraud, any rights or liabilities in him, as such shareholder, nor received any benefit from

PAGE

his shares, and that within a reasonable time after notice of the fraud he had repudiated the shares and given notice to the plaintiffs of his repudiation :—*Held*, a good plea.
THE BWLCH-Y-PLWM LEAD MINING COMPANY *v.* BAYNES .. 324

3. COMPANY : *See* RAILWAY COMPANY.

COMPROMISE, authority of attorney to make 109
See ATTORNEY. 1.

CONDITION, in conditions of sale of land for compensation for mistake in particulars 72
See VENDOR AND PURCHASER.

———— what is an unreasonable, under the Railway and Canal Traffic Act 173
See RAILWAY COMPANY. 1.

CONDITION PRECEDENT, in contract of sale 193
See CONSTRUCTION. 4.

———————— in fire policy 237
See CONSTRUCTION. 5.

CONDITIONS OF SALE, construction of 72
See VENDOR AND PURCHASER.

CONSIDERATION, what amounts to a failure of, in a bill of exchange .. 56
See BILL OF EXCHANGE.

CONSTRUCTION — *Guarantee, Continuing — Future Debt.*] The defendant's son being indebted to the plaintiffs for coals supplied on credit, and the plaintiffs refusing to continue to supply coals unless guaranteed, the defendant gave this guarantee : "In consideration of the credit given by the H. G. Co. to my son, for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*, and in default of his payment of any accounts due, I bind myself by this note to pay to the H. G. C. Co. whatever may be owing, to an amount not exceeding the sum of 100*l.*" :—*Held*, a continuing guarantee.
WOOD AND ANOTHER *v.* PRIESTNER 66
S. C. affirmed in Ex. Ch. 282

2. ————————, *Smoke—Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), s. 108.] The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 108, imposes a penalty on persons so negligently using a furnace as not to "consume the smoke" arising from it. The Birmingham Improvement Act, 1851 (14 & 15 Vict. c. xciii.), s. 55, incorporates the above section, but provides that the words "consume the smoke" shall not be in all cases read as "consume *all* the smoke ;" and that the penalty may be remitted if the person summoned under that section has so constructed or altered his furnace as to consume *as far as possible* its smoke, "and has carefully attended to the same, and consumed *as far as possible*" its smoke. On an information against the appellant for so negligently using his furnace as not to consume its smoke, it was not shewn that the furnace was improperly constructed ; it was found that it was capable of consuming more smoke than it in fact did ; but that to use the means provided for that purpose would render it impossible to carry on the appellant's trade with that furnace. The appellant was convicted :—*Held* (assuming the furnace to be properly constructed), that "as far as possible" meant as far as possible consistently with carrying on the trade in which the furnace was employed ; and that the appellant was wrongly convicted.
COOPER, APPELLANT *v.* WOOLLEY, RESPONDENT 88

PAGE

3. CONSTRUCTION, *Slaughter House—Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *s.* 126.] By the Towns Improvement Clauses Act, 1847, s. 126, no new slaughter house is to be used in places to which the act applies, without the licence of the "commissioners." By s. 45 of the Local Government Act, 1858 (which is, by s. 5, to take effect in all places where the Public Health Act, 1848, has been adopted), the above clause is incorporated, and by s. 7 the local board is, for the purposes of the clause, to be deemed the "commissioners." In Brecon the Public Health Act, 1848, was adopted, and by s. 12 of that act the corporation was the local board. By a private act (1 Vict. c. xii.) the corporation were empowered to carry out certain public works (including the erection of slaughter houses), and for that purpose to borrow money and to buy land. The corporation having failed to carry out those purposes, and having mortgaged their property to subscribers to the undertaking, the subscribers were by another private act (25 & 26 Vict. c. clxxxvi.) incorporated as the Brecon Markets Company; the property of the corporation of Brecon was (with certain exceptions) vested in them; powers were given to them similar to those given by the former act to the corporation, and in particular (by s. 65) they were empowered to erect slaughter houses with the written consent of the corporation, given under the hand of the mayor or the town clerk. The company obtained the consent required by s. 65 of the second private act, erected a slaughter house, and demised the tolls to the plaintiff; but the corporation, acting as the local board, refused to license the use of the slaughter house, and the lessee could therefore levy no tolls. In an action brought by the lessee against the company for a breach of their agreement to let the tolls:—*Held*, that the consent provided for by s. 65 of the private act neither constituted nor superseded the necessity of the licence of the corporation as the local board; that, in the absence of any evidence that the consent actually obtained was intended to operate as a licence under the Towns Improvement Clauses Act, 1847, it amounted only to a consent by the corporation under the private act; and that therefore the plaintiff was entitled to recover.

ANTHONY *v.* THE BRECON MARKETS COMPANY 167

4. ——————*Contract of Sale—Condition Precedent.*] The plaintiffs contracted to supply the defendants with goods, "delivering on April 17th, complete 8th May." The plaintiffs made no delivery on the 17th, and the defendants on the following day rescinded the contract, and refused subsequent tenders of the goods. The plaintiffs having brought an action for non-acceptance:—*Held*, that, if on the true construction of the contract the plaintiffs were bound to commence the delivery on the 17th of April, the defendants were entitled to rescind for the failure to deliver on that day; but

Quære, whether the contract bound the seller to commence delivery on the 17th of April?

Held, per Kelly, C.B., and Pigott, B., that it did not bind the seller to commence delivery on the 17th, but only to deliver at reasonable times between the 17th and the 8th; per Martin and Bramwell, BB., that it did bind the seller to commence delivery on the 17th.

CODDINGTON AND OTHERS *v.* PALEOLOGO AND OTHERS .. 193

5. ——————, *Fire Insurance—Policy—Arbitration Clause—Condition precedent and collateral Covenant.*] In a policy of fire insurance entered into by the plaintiff with the defendants the covenant for payment was made subject to certain articles; one of which provided that, on a loss occurring, the assured should within fifteen days send in particulars of his loss, "which loss or damage, after the same shall be adjusted, shall immediately be paid in money by" the defendants,

PAGE

with an option to them to reinstate, and a proviso that "in case any difference shall arise touching any loss or damage, such difference shall be submitted" to arbitrators, "whose award in writing shall be conclusive and binding on all parties; but if there shall appear any fraud or false swearing, the claimant shall forfeit all benefit of his claim." In an action brought on this policy to which the defendants pleaded this article, and that the plaintiff had not submitted the matter to arbitration:—*Held*, on demurrer (Bramwell, B., dissenting) that the covenant was only a covenant to pay the adjusted loss, and that the plaintiff had no cause of action.

ELLIOTT *v.* THE ROYAL EXCHANGE ASSURANCE COMPANY .. 237

6. CONSTRUCTION—*Lease—Reservation of Passage for "Water and Soil."*] In a lease of certain premises with their appurtenances the lessor reserved out of the demise "the free running of water and soil coming from any other buildings and lands contiguous to the premises hereby demised in and through the sewers and watercourses made or to be made within, through, or under the said premises:"—*Held*, first, that the reservation extended to water and soil coming from contiguous lands and buildings, whether that water or soil in the first instance actually arose on or from such contiguous lands or buildings or not; and secondly, that it did not extend beyond water in its natural condition, and such matters as are the product of the ordinary use of land for habitation, and that therefore it did not give to the occupier of certain tan-pits, who claimed under the lessor, a right of passage for the refuse of those pits.

CHADWICK AND ANOTHER *v.* MARSDEN 285

7. ——— of conditions of sale of land 72
See VENDOR AND PURCHASER.

8. ——— of covenants in lease 92
See LANDLORD AND TENANT. 1.

9. ——— of policy of marine insurance 139
See MARINE INSURANCE. 1.

10. ——— of the Companies Clauses Consolidation Act, 1845 158
See COMPANY. 1.

11. ——— of reservation of right of shooting in private inclosure act 202
See INCLOSURE ACT.

12. ——— of s. 86 of 12 & 13 Vict. c. 106 248
See BANKRUPT LAW CONSOLIDATION ACT, 1849. 2.

13. ——— of 38 Geo. 3, c. 5, s. 25 253
See LAND TAX.

14. ——— of bill of lading 267
See SHIP AND SHIPPING. 4.

15. ——— of charterparty 333, 335
See SHIP AND SHIPPING. 3, 5.

16. ——— of deed under Bankruptcy Act, 1861 352
See BANKRUPTCY ACT, 1861. 11.

17. ——— of contract between railway company and landowner 356
See CORPORATION CREATED BY STATUTE.

18. ——— of rules of mutual insurance society 400
See MARINE INSURANCE. 2.

CONTINUING GUARANTEE, what amounts to 66, 282
See CONSTRUCTION. 1.

PAGE

CONTRACT—*Illegality—Non-communication of Ground of Refusal to complete—Blasphemous Publication.*] The defendant contracted to let rooms to the plaintiff; afterwards, discovering that they were intended to be used for the delivery of lectures maintaining that the character of Christ is defective and His teaching misleading, and that the Bible is no more inspired than any other book, he refused to allow the use of them, but did not assign this as a reason for his refusal. In an action for breach of the contract:—*Held*, first, that the publication of such doctrines was blasphemy, and that therefore the purpose for which the plaintiff intended to use the rooms was illegal, and the contract one which could not be enforced at law. Secondly, that the defendant was entitled to justify his refusal on this ground, notwithstanding his having assigned a different reason.

COWAN *v.* MILBOURN 230

2. ———, *Personal Services—Effect of Death—Vested Right of Action.*] Although a contract involving personal confidence is put an end to by the death of the party confided in, it is not thereby rescinded so as to take away a right of action already vested. The defendants employed S. as consulting engineer for fifteen months to complete certain works. S. was to be paid 500*l.* for his services in equal quarterly instalments. Before the work was finished, and whilst two quarterly instalments which were due to him were still unpaid, he died:—*Held*, that his personal representative was entitled to recover them.

STUBBS, ADMINISTRATOR *v.* THE HOLYWELL RAILWAY COMPANY .. 311

3. ———, *Contract to serve as Seaman—Ordinary Voyage—Illegality—Increased Danger—Foreign Enlistment Act* (59 *Geo.* 3, *c.* 69), *ss.* 2, 7—*Remoteness of Damage.*] The plaintiff agreed with the defendant to serve as one of the crew of a ship, whereof the defendant was master, for twelve months, from London to Rio, or any other of the ports specified in the agreement, amongst which were ports in the Pacific Ocean, and back to a final port of discharge, and to obey during that period all the defendant's lawful commands. He subsequently sailed for Rio with the ship. She was destined, as it appeared from her charterparty, for the service of the Peruvian government, and had on board a cargo of coal and ammunition. In the course of her voyage to Rio she joined company with two Peruvian war steamers, to which from time to time she supplied coal and ammunition. At Rio it became known to the plaintiff and the defendant that hostilities had commenced between Spain and Peru, two powers at peace with England. The defendant, notwithstanding this circumstance, announced to the plaintiff that he intended to go on to Callao, in the Pacific, another Peruvian port. He was at that time acting under the direction of a Peruvian agent on board the ship, who received his instructions from the commanders of the two war steamers. The plaintiff objected to serve any further on the voyage on the ground that it had become illegal, and involved greater danger than he had anticipated when he entered into his agreement with the defendant. He accordingly left the ship. In an action for breach of contract brought by him against the defendant:—*Held*, per Kelly, C.B., Martin and Pigott, BB. (Bramwell, B., doubting), that the defendant must be taken to have engaged the plaintiff for an ordinary voyage, and that the plaintiff was entitled to treat as a breach of contract the defendant's employment of him on a voyage which would expose him to greater danger than he originally had reason to anticipate. Per Kelly, C.B.: To serve on board a vessel used as a store ship in aid of a belligerent, the fitting out of which to be so used is an offence within the 59 Geo. 3, c. 69, s. 7, is "a serving on board a vessel for a warlike purpose in aid of a foreign state" within s. 2 of that act. The plaintiff, after

PAGE

leaving the defendant's ship, was imprisoned at Rio for some days as a Peruvian deserter. When he came out of prison the ship had gone, carrying some of his clothes on board of her. The jury awarded damages both for the imprisonment and the loss of clothes:—*Held*, per Martin, Bramwell, and Channell, BB. (Kelly, C.B., dissenting), that these damages were too remote to be recoverable.
BURTON *v.* PINKERTON 340

4. CONTRACT, variation of, within Statute of Frauds 135
See FRAUDS, STATUTE OF.

5. ———— to give bill of sale, effect of 304
See BILL OF SALE.

6. ————, power of corporation created by statute, to bind themselves by 356
See CORPORATION CREATED BY STATUTE.

CONTRACT OF SALE, construction of 193
See CONSTRUCTION. 4.

CONVEYANCE, stamp upon 46, 399
See STAMPS. 1, 2.

CORPORATION CREATED BY STATUTE—*Contract—Railway Company—Ultra vires—Power of Directors—Appropriation of Funds of Company by Act—Onus of Proof—Malum prohibitum—Construction.*] A railway company being about to apply to parliament for an extension act, an agreement was made under the seal of the company with the plaintiff, a landowner on the course of the intended line, by which, after reciting that the plaintiff had agreed to withhold his intended opposition to the bill on the terms therein mentioned, the company agreed, by clause 3, that they would, within three months after the passing of the bill, pay to the plaintiff 2000*l.*, "as and for a personal compensation to him for the annoyance, inconvenience, disturbance, damage, loss, and injury which he has sustained, or may or will sustain, in respect of the sporting and preservation of game upon his estate, by or in consequence of the construction of the intended railway, and of the parliamentary and other surveys, and other works connected therewith and incidental thereto;" by clause 14, the plaintiff agreed that in consideration of the preceding articles he would not further oppose the passing of the bill during the then present session of parliament. The bill passed, and three months afterwards the plaintiff brought an action to recover the 2000*l.* mentioned in clause 3:—*Held*, first, that clause 3 was an absolute unconditional covenant to pay the 2000*l.* within three months after the passing of the bill. Secondly by (Keating, Mellor, Montague Smith, and Lush, JJ.), reversing the decision of the Court of Exchequer, that the funds of the company being both by the original and the new act appropriated to specific purposes, which did not include the consideration for the present covenant, the covenant sued on was ultra vires, in the sense that the legislature intended that such a contract should not be made, and that the company was therefore not bound by it. By Willes and Blackburn, JJ., that the contract was not expressly or by necessary implication prohibited, and that the company was therefore bound. By Blackburn, J., that the case was governed by *Eastern Counties Railway Company* v. *Hawkes* (5 H. L. C. 331). By Keating, Mellor, Montague Smith, and Lush, JJ.: that *Eastern Counties Railway Company* v. *Hawkes* was not inconsistent with their decision; and by Mellor, J., that the present case was governed by *Preston* v. *Liverpool &c. Railway Company* (5 H. L. C. 605; 25 L. J. (Ch.) 421), and *Macgregor* v. *Dover and Deal Railway Company* (18 Q. B. 618; 22 L. J. (Q. B.) 69).

PAGE

By Keating, Mellor, Montague Smith, and Lush, JJ.: When the act by which a company is incorporated limits its objects, and appropriates its funds to defined purposes, a contract made by the company, which discloses on the face of it that, if carried out, it will cause an appropriation of the funds to purposes other than those so authorized, cannot be enforced at law. By Willes and Blackburn, JJ.: A company incorporated by statute is entitled to make all contracts connected with the purposes of its incorporation not expressly or by necessary implication prohibited; all such contracts are primâ facie valid; and it lies upon the company seeking to repudiate a contract to shew that it is prohibited, not upon the opposite party to shew that it is authorized. By Keating, Montague Smith, and Lush, JJ.: The appropriation of the funds of a railway company made by its act of incorporation creates a public trust which a court of law will recognise. By Willes and Blackburn, JJ.: Such an appropriation only creates, at most, a trust for the shareholders, to be enforced by them in equity; but *quære*, whether they could have any relief in equity against such a contract as that declared on?

TAYLOR *v.* THE CHICHESTER AND MIDHURST RAILWAY COMPANY Ex. Ch. 356

COSTS, under s. 86 of 12 & 13 Vict. c. 106 248
See BANKRUPT LAW CONSOLIDATION ACT, 1849. 2.

COURT, discretion of, in issuing writ of 284
See PRACTICE. 3.

COVENANT TO REPAIR, construction of 92
See LANDLORD AND TENANT. 1.

"CREDITOR," meaning of word 105, 396
See BANKRUPTCY ACT, 1861. 5, 13.

CROSS DEMURRERS, right to begin where there are 400
See MARINE INSURANCE. 2.

CROWN, privileges of royal residences 290
See ROYAL RESIDENCE.

CUSTOM—*Unreasonableness.*] A custom for inhabitants of a parish to exercise and train horses at all seasonable times of the year, in a place beyond the limits of the parish, is bad.

SOWERBY *v.* COLEMAN AND OTHERS 96

2. ————, effect of, upon reputed ownership, clause in Bankruptcy Act 101
See BANKRUPTCY LAW CONSOLIDATION ACT, 1849. 1.

3. ————, evidence of mercantile 125
See SHIP AND SHIPPING. 2.

4. ————, evidence of notice of 125
See SHIP AND SHIPPING. 2.

DAMAGE, special, in action for obstructing highway plaintiff must shew 316
See HIGHWAY.

————, special, in action for slander 327
See DEFAMATION.

————, when too remote 340
See CONTRACT. 3.

DEATH, effect of, during continuance of contract 311
See CONTRACT. 2.

PAGE

DEBTOR AND CREDITOR—*Charging Order—Charge on contingent Equitable Interest*—1 & 2 *Vict. c.* 110, *s.* 14—3 & 4 *Vict. c.* 82, *s.* 1.] The defendant, being possessed of shares in a public company, transferred them to B. as a security for a debt. Subsequently he assigned them (subject to B.'s debt) to trustees upon trust to repay a loan which had been made to him by his brother, and to apply the surplus for the benefit, at the trustees' discretion, of his wife, his children, or himself. There were other trusts for the benefit of his wife and children, and an ultimate trust, on his wife's decease, and in case no child attained the age of twenty-one, or being a daughter married before that age, to the defendant and his assigns:—*Held*, that he had an "interest" in the shares capable of being charged under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1.
CRAGG *v.* TAYLOR 131

DEBTOR AND CREDITOR. *See* BANKRUPTCY ACT, 1861.

DEDICATION, what amounts to evidence of 316
See HIGHWAY.

DEED of arrangement under Bankruptcy Act, 1861 .. 21, 42, 115, 394, 396
See BANKRUPTCY ACT, 1861. 1, 4, 6, 12, 13.

———, effect of material addition to 189
See BANKRUPTCY ACT, 1861. 8.

———, under Bankruptcy Act, 1861, containing release, but not pleaded 208
See BANKRUPTCY ACT, 1861. 9.

———, parties to, under Bankruptcy Act, 1861 352
See BANKRUPTCY ACT, 1861. 11.

DEFAMATION—*Slander—Words spoken in respect of Business—Special Damage.*] Spoken words imputing to a man misconduct in his office or trade are actionable, although the office or trade is not one of which the Court can take judicial notice. The declaration alleged that it was the duty of the plaintiff, as a gamekeeper, not to kill foxes, that he was employed on the terms of his not doing so, and that a person killing foxes would not be employed as gamekeeper; that the defendant, knowing the premises, falsely and maliciously said of the plaintiff, as such gamekeeper, that he killed foxes; special damage:—*Held*, on demurrer, a good declaration, even without the allegation of special damage.
FOULGER *v.* NEWCOMB 327

DEMURRERS, right to begin upon cross 400
See MARINE INSURANCE. 2.

DIRECTORS, powers of, under the Companies Clauses Consolidation Act, 1845 158
See COMPANY. 1.

———— of railway company, power of, to contract 356
See CORPORATION CREATED BY STATUTE.

DISCRETION OF COURT in issuing writ of sci. fa. 284
See PRACTICE. 3.

EASEMENT — *Watercourse — Riparian Owner — Grant — Division of Stream.*] The plaintiff was the lessee of a mill situated on riparian land. A., through whom he derived title, had, in 1804, under a written agreement with the adjoining higher riparian owner, and

PAGE

subject to an annual payment, constructed a goit on the higher owner's land, intercepting the water of the stream at a weir in that land, and bringing it thence to his mill. The flow of the water through this goit had ever since been enjoyed by the millowner, and used for the purpose of working the mill; and the annual acknowledgment had been paid. The defendant, a riparian owner above the weir, and also a mill-owner, intercepted the water of the stream for the purposes of his mill; and the plaintiff sued for damages:—*Held*, that he was entitled to recover. *Held* (per Pollock, C.B., and Channell, B.), that what was done amounted to a division of the stream into two courses; and that the plaintiff was a riparian proprietor in respect of the goit. *Held* (per Bramwell, B.), that a riparian landowner can grant to a non-riparian landowner the flow of water from the stream to his premises, for the use of the premises; and that the grantee may sue for a disturbance of his enjoyment by a higher riparian owner.

Stockport Waterworks Company v. *Potter* (3 H. & C. 300) considered.

NUTTALL *v.* BRACEWELL 1

EVIDENCE of mercantile custom 125
See SHIP AND SHIPPING. 2.

——— of fraudulent misrepresentation by agent in the course of his employment 259
See PRINCIPAL AND AGENT. 2.

——— of user of highway by public 316
See HIGHWAY.

EXECUTION, sheriff directed to withdraw when debtor executed deed under Bankruptcy Act, 1861, after seizure 35
See BANKRUPTCY ACT, 1861. 3.

——— of process after notice that a composition deed was about to registered 249
See BANKRUPTCY ACT, 1861. 10.

FAILURE OF CONSIDERATION for a bill of exchange, what amounts to 56
See BILL OF EXCHANGE.

FELLOW SERVANT, injury to servant by negligence of 30
See MASTER AND SERVANT.

FI. FA., execution of writ of, in royal residence 290
See ROYAL RESIDENCE.

FIRE INSURANCE, construction of policy of 237
See CONSTRUCTION. 5.

FOREIGN ENLISTMENT ACT, ss. 2, 7 340
See CONTRACT. 3.

FOREIGN MARKET, effect of order to purchase at 82
See PRINCIPAL AND AGENT. 1.

FORFEITURE of lease, effect of notice to repair 92
See LANDLORD AND TENANT. 1.

FRAUD, evidence of fraudulent misrepresentation by agent in the course of his employment 259
See PRINCIPAL AND AGENT. 2.

———, plea of, in action for calls 324
See COMPANY. 2.

PAGE

FRAUDS, STATUTE OF (29 *Car.* 2, *c.* 3, *s.* 17)—*Variation of Contract—Implied Rescission—Invalid Substituted Contract.*] A contract in writing was made for the sale of goods above 10*l.* in value, to be delivered at a future time. Before the time for delivery arrived the parties made a parol agreement extending the time:—*Held*, that the parol agreement, being invalid under the Statute of Frauds (29 Car. 2, c. 3), s. 17, did not effect an implied rescission of the former contract. *Moore* v. *Campbell* (10 Ex. 323) followed.
NOBLE *v.* WARD AND OTHERS .. .. .. Ex. Ch. 135

FRAUDULENT PREFERENCE, what amounts to 304
See BILL OF SALE.

FREIGHT, liability of consignee for, after indorsement of bill of lading .. 37
See SHIP AND SHIPPING. 1.

————, mode of calculating 125, 333
See SHIP AND SHIPPING. 2, 3.

"FULL AND COMPLETE CARGO," meaning of words in charterparty 335
See SHIP AND SHIPPING. 5.

GAME, reservation of right of shooting in private inclosure act 202
See INCLOSURE ACT.

GENERAL COVENANT TO REPAIR, construction of 92
See LANDLORD AND TENANT. 1.

GENERAL MANAGER of a railway company has authority to bind the company to pay for surgical attendance on person injured on railway .. 228
See RAILWAY COMPANY. 3.

GRANT, rights of riparian owners to watercourse 1
See EASEMENT.

GUARANTEE, what amounts to a continuing 66, 282
See CONSTRUCTION. 1.

HAMPTON COURT PALACE, privileges of, as a royal residence .. 290
See ROYAL RESIDENCE.

HIGHWAY—*Action for Obstruction—Special Damage—Dedication—Evidence of User—Practice as to entering Verdict on Leave reserved.*] In order to maintain an action for obstructing a public way, the plaintiff must suffer some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way. In an action for obstructing a public way, the plaintiff proved no damage peculiar to himself beyond being delayed on several occasions in passing along it, and being obliged, in common with every one else who attempted to use it, either to pursue his journey by a less direct road, or else to remove the obstruction:—*Held*, that he was not entitled to maintain the action. In order to prove that the way was in fact public, evidence was given of acts of user extending over nearly seventy years; but during the whole period the land crossed by the way had been on lease. The judge told the jury that they were at liberty, if they thought proper, to presume from these acts a dedication of the way to the public by the defendant or his ancestor, at a time anterior to the land being leased:—*Held*, a proper direction. Where leave is reserved by a judge at nisi prius to enter a nonsuit, the Court will, notwithstanding the leave reserved being thus restricted in point of form, order a verdict to be entered for the defendant on one issue without disturbing the verdict found for the plaintiff on another, if

PAGE

that course seems most consistent with doing justice between the parties.
WINTERBOTTOM *v.* LORD DERBY 316
HOSPITAL, exemption of, from land tax 253
See LAND TAX.

ILLEGALITY. Right to rescind contract to let rooms to the plaintiff on discovery of the plaintiff's intention to use the rooms for the purpose of delivering blasphemous lectures 230
See CONTRACT. 1.
———— of voyage, effect of, upon contracts with seamen 340
See CONTRACT. 3.
———— effect of assignment by railway company of the whole of their rolling stock 225
See RAILWAY COMPANY. 2.

INCLOSURE ACT—*Game—Reservation of exclusive Right of Shooting—Construction.*] By a private inclosure act an allotment was directed of certain waste lands; by s. 24 the mines, &c., under the allotments were not to be taken into the valuation of the allotments, they being reserved to the lord; by s. 32, subject to the reservations in the act, the allotments were to be the freeholds of the allottees; by s. 34 it was provided that the lord should have, &c., "all rents, &c., piscaries, fishing, hunting, hawking, and fowling, and all beasts and birds considered game, &c., and all other royalties, liberties, privileges, franchises, pre-eminences, jurisdictions, and appurtenances," in as ample a manner as they are now, or have been heretofore used, exercised, and enjoyed by him, or as he "might or could have held, used, &c., the same" in case the act had not been passed: that section contained no reference to mines, but s. 35 reserved them to the lord, with certain powers of search and working. Before the act there was no right of free warren in the lord:—*Held*, that the act did not confer on or reserve to the lord an exclusive right of sporting over the allotments. *Ewart* v. *Graham* (7 H. L. C. 331) distinguished.
LORD LECONFIELD *v.* DIXON AND OTHERS 202
INDORSEMENT of bill of lading 37
See SHIP AND SHIPPING. 1.
INEQUALITY in deeds under Bankruptcy Act, 1861 .. 21, 42, 275, 394
See BANKRUPTCY ACT, 1861. 1, 2, 4, 12.
INSOLVENCY: *See* BANKRUPTCY ACT, 1861.
INSURABLE INTEREST, what amounts to 139
See MARINE INSURANCE. 1.
INSURANCE: *See* MARINE INSURANCE; FIRE INSURANCE.

JUDGMENT, action for maliciously signing 15
See ACTION. 1.

LAND TAX—*Exemption—Hospital—Construction*—38 *Geo.* 3, *c.* 5, *s.* 25.] In 38 Geo. 3, c. 5, s. 25 (rendered perpetual by 38 Geo. 3, c. 60, s. 1) is contained an exemption from land tax of "any hospital" in respect of its site. Commissioners appointed by the Crown to administer a fund subscribed by the public for that purpose, founded, in 1857, an asylum for the maintenance and education of three hundred daughters of soldiers, sailors, and marines, dying in active service. The asylum was built and maintained entirely out of that fund, and solely for the benefit of the children, and was under the control of the commis-

PAGE

sioners:—*Held*, first, that the asylum was not within the exemption in the act, that exemption applying only to institutions and sites existing at the time when the tax was made perpetual. Secondly, that it was not exempt as Crown property, such exemption depending not on the ownership but the occupation by the Crown.
LORD COLCHESTER AND OTHERS *v.* KEWNEY .. Ex. Ch. 253

LANDLORD AND TENANT—*General Covenant to Repair—Covenant to Repair after Notice—Effect of Notice—Forfeiture, Waiver of.*] An indenture of lease, with a clause for re-entry, contained a general covenant on the part of the lessee to keep the premises demised in repair, and a further covenant that he would, within three months after notice being given to him by the landlord, repair all defects specified in the notice. The premises demised being out of repair, the landlord gave the lessee notice to repair, "in accordance with the covenants" of the lease. Before the expiration of three months, ejectment was brought:—*Held*, that the notice was not a waiver of the forfeiture incurred by the breach of the general covenant to repair, and that the action was maintainable.
FEW *v.* PERKINS AND OTHERS 92

2. ——————————, construction of lease 285
See CONSTRUCTION. 6.

LEASE, construction of 92, 285
See LANDLORD AND TENANT. 1. CONSTRUCTION. 6.

LEAVE RESERVED, practice as to entering verdict upon 316
See HIGHWAY.

LEAVE TO APPEAR under Bills of Exchange Act may be rescinded .. 56
See BILL OF EXCHANGE.

LETTER OF LICENCE is not a deed within the Bankruptcy Act, 1861 115
See BANKRUPTCY ACT, 1861. 6.

LICENCE, letter of, is not a deed within the Bankruptcy Act, 1861 .. 115
See BANKRUPTCY ACT, 1861. 6.

LIMITATIONS, STATUTE OF—21 *Jac.* 1, *c.* 16, *s.* 3—*Acknowledgment—Payment—Transaction where no Money actually passes.*] To constitute a payment of interest sufficient to take a debt out of the operation of the Statute of Limitations, it is not essential that money should actually pass between the debtor and creditor. After a debt due to the plaintiff from his son had been barred by the statute, the plaintiff, his son, and his son's wife, had an interview at which the interest due was calculated. The plaintiff's son then put his hand into his pocket, as if to get out the money to pay it. The plaintiff stopped him, and writing a receipt for the interest, gave it to his son's wife, saying that he would make her a present of the money. No money actually passed between the parties:—*Held* (by Martin, Channell, and Pigott, BB.; Bramwell, B., dissenting), that this transaction was a sufficient payment to take the debt out of the Statute of Limitations.
MABER *v.* MABER, EXECUTRIX 153

LLOYD'S BONDS, what evidence admissible to impeach validity of .. 225
See RAILWAY COMPANY. 2.

MALICIOUSLY SIGNING JUDGMENT, action for 15
See ACTION. 1.

MANAGER, GENERAL, has authority to bind railway company to pay for surgical attendance on person injured on railway 228
See RAILWAY COMPANY. 3.

PAGE

MARINE INSURANCE—*Policy on Adventure—Construction—Atlantic Cable—Insurable Interest—Wages.*] The plaintiff, being a shareholder in the Atlantic Telegraph Company, caused himself to be insured with the defendant in a policy, which was a common printed form of a marine policy, filled up with interlineations and marginal additions, and which contained the following words: "At and from Ireland to Newfoundland, the risk to commence at the lading of the cable on board the *Great Eastern*, and to continue until it be laid in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted each way . . . . the ship, &c., goods, &c., are and shall be valued at 200*l.* on the Atlantic cable, value, say on 20 shares, at 10*l.* per share:" and also, written opposite to the clause, "touching the adventures, &c." the words, "it is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable, from and including its loading on board the *Great Eastern*, until one hundred words be transmitted from Ireland to Newfoundland, and vice versâ, and it is distinctly declared and agreed that the transmission of the said one hundred words from Ireland to Newfoundland, and vice versâ, shall be an essential condition of the policy." The attempt to lay the cable failed, through the cable breaking whilst it was being hauled in to remedy a defect in the insulation; but one half of the cable was saved:—*Held*, first, that the policy was not on the cable, but on the plaintiff's interest in "the adventure," that is, on the profits to be derived by him from the success of the adventure; and *semble*, that the adventure was the attempt to lay the cable on that voyage. Secondly, that such an interest was an insurable interest. Thirdly, that the loss was a loss by the perils insured against. Fourthly, that whether the adventure insured was the adventure of laying the cable on that voyage, or of laying it generally, the loss was total, inasmuch as by the breaking of the cable the probability of laying it was reduced to a mere chance, and the case was therefore within the rule making the loss of a ship total at the time of capture, although there may exist a spes recuperandi.

WILSON *v.* JONES .. .. Ex. Ch. 139

2. ——————————, *Mutual Insurance Society—Liability of Individual Shareholder—Remedy in Case of Loss—Cross Demurrers—Right to begin.*] In the Court of Exchequer, when there are cross demurrers to be argued, the party demurring first has the right to begin. *Hill* v. *Cowdery* (1 H. & N. 360) adhered to. The plaintiff and defendant were members of a mutual insurance society, and the defendant, with the other members of the society, were insured to the plaintiff upon his ship in a sum specified in a policy of insurance, subscribed by the defendant and the other members of the society. Annexed to the policy, and forming part of it, were the following, amongst other rules:—The members of this association shall severally and respectively, and not jointly or in partnership, or the one for the other of them, but each only in his own name, insure each other's ships from the date of entry of each respectively until noon of the 20th of February then next, and from that time until noon of the 20th of February in the next succeeding year, and so on from year to year, against all losses, &c. [A rule nominating managers, and providing that they should meet once a quarter to audit accounts and settle claims.] In order more readily to provide for the payment of claims, the managers are hereby empowered to levy contribution of one-fourth part of the fixed annual premium, which shall be drawn for [in a prescribed manner]. Provided always, that if the gross amount of losses and expenses during the year shall happen to exceed

PAGE

the amount of the premiums so realized, the deficiency shall be made good by an additional percentage, which the members, during the year, shall be respectively bound to contribute and pay to the managers; but should the premiums so realized exceed the losses, &c., then the surplus shall be returned in proportion to the amount of premium respectively contributed by them. The managers' drafts on the members of the association for their proportion of the annual fixed premium, and for any additional percentage, shall be duly accepted, and punctually paid when due; and if any member shall neglect to accept any such drafts, or to pay his contributions thereto, on receiving notice from the managers, his respective ship or ships shall immediately cease to be insured in this association, and he shall thenceforth forfeit all claims in respect of any loss, &c., under his policy; but he shall still remain liable to contribute to all losses and averages which may occur during the period for which any such policy was originally granted, and the amount due from any defaulting member shall be considered as a debt due to the managers, and shall be recoverable by them at law. To a declaration setting out the policy and rules, and containing the usual averments of loss, &c., the defendant pleaded, first, that he had paid the percentage required of him by the managers; and secondly, that the action was commenced before the managers' drafts on him were due:—*Held*, that on the true construction of the rules, and under the circumstances as they appeared on the record, the defendant was not individually liable.

REDWAY *v.* SWEETING 400

MARKET, FOREIGN, effect of order to purchase at 82
See PRINCIPAL AND AGENT. 1.

MASTER AND SERVANT—*Negligence—Fellow Servant—Common Control.*] The plaintiff was a porter in the employment of the L. & N. W. R. Co. at their Manchester station. The defendants also used that station, and their servants whilst within the station were subject to the rules of the L. & N. W. R. Co., and to the control of their station-master. The plaintiff, whilst engaged in his usual employment in the station, was injured by the negligence of the defendants' engine-driver, in shunting a train without signal:—*Held*, that the plaintiff and the defendants' engine-driver were not fellow servants.

WARBURTON *v.* THE GREAT WESTERN RAILWAY COMPANY .. 30

MATERIAL ADDITION to deed, effect of 189
See BANKRUPTCY ACT, 1861. 8.

MISREPRESENTATION by agent in the course of his employment, effect of 259
See PRINCIPAL AND AGENT. 2.

MISTAKE, effect of, in particulars in conditions of sale 72
See VENDOR AND PURCHASER.

MONEY HAD AND RECEIVED, action for, where money obtained by misrepresentation of agent 259
See PRINCIPAL AND AGENT. 2.

MUTUAL INSURANCE SOCIETY, construction of rules of 400
See MARINE INSURANCE. 2.

NEGLIGENCE, injury to servant by, of fellow servant 30
See MASTER AND SERVANT.

———, power of attorney to make a compromise 109
See ATTORNEY. 1.

PAGE

NEGLIGENCE by railway company in carrying goods 173
See RAILWAY COMPANY. 1.

PALACE, privilege of royal 290
See ROYAL RESIDENCE.

PARTICULARS of land in conditions of sale, effect of mistake in 72
See VENDOR AND PURCHASER.

PARTIES, when an action is commenced in the name of a dead man, his representatives cannot be substituted as Plaintiffs 54
See PRACTICE. 2.

PARTIES TO DEED under Bankruptcy Act, 1861 352
See BANKRUPTCY ACT, 1861. 11.

PARTNERSHIP—*Attorney—Power to draw Cheques—Post-dated Cheque—Bill of Exchange.*] A member of a firm of attorneys has no implied authority to bind his co-partners by a post-dated cheque, drawn in the name of the firm.

Quære, as to the effect of the revenue laws upon post-dated cheques.

FORSTER *v.* MACKRETH 163

PAYMENT, mode of making, so as to bar Statute of Limitations .. 153
See LIMITATIONS, STATUTE OF.

PERSONAL SERVICES, contract for construction of 311
See CONTRACT. 2.

PLEA to further maintenance of action 275
See BANKRUPTCY ACT, 1861. 2.

——— of deed under Bankruptcy Act, 1861, form of 406
See BANKRUPTCY ACT, 1861. 14.

PLEADING a deed under the Bankruptcy Act, 1861, is no answer to a claim for unliquidated damages 105
See BANKRUPTCY ACT, 1861. 5.

————, time for pleading release in deed under Bankruptcy Act, 1861 183
See BANKRUPTCY ACT, 1861. 7.

————, fraud of agent in the course of his employment may be charged as fraud of principal 259
See PRINCIPAL AND AGENT. 2.

————, plea to further maintenance of action 275
See BANKRUPTCY ACT, 1861. 2.

————, plea to action for calls 324
See COMPANY. 2.

————. *See* PRACTICE.

POLICY OF INSURANCE, construction of 139
See MARINE INSURANCE. 1.

POST-DATED CHEQUE, one attorney has no power to bind his partner by 163
See PARTNERSHIP.

PRACTICE—*Bail Bond—Sufficiency of Affidavit of Debt.*] An affidavit of debt, whereon a judge's order holding a defendant to bail was founded, stated simply that the defendant "was well and truly indebted" to the plaintiff, "for money lent and goods sold and delivered," without averring either that the money was lent or that the goods were sold and delivered by the plaintiff to the defendant:—*Held*, insufficient.

HANDLEY *v.* FRANCHI 34

2. ————, *Parties—Amendment—Dead Plaintiff—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 222.] Where an action

PAGE

is commenced in the name of a dead man, his representatives cannot be substituted as plaintiffs.

CLAY *v.* OXFORD 54

3. PRACTICE—*Sci. Fa.—Discretion of Court—Sci. Fa. on a Record erroneous on the Face of it.*] The Court will not refuse to issue a writ of sci. fa., to obtain execution on a judgment, on the ground that the judgment roll is erroneous on the face of it.

WILLIAMS *v.* THE SIDMOUTH RAILWAY AND HARBOUR COMPANY. *Re* WEBBER 284

4. ———, *Special Case—Agreement to waive Stamp Objections—Striking out Case.*] A case was stated for the opinion of the Court in which the question was whether the plaintiffs were entitled to recover from the defendants a sum due on an alleged contract of insurance. It appeared that no stamped policy had been issued, and that the covering note or memorandum of insurance was also unstamped. For the purposes of the case, however, the parties agreed that a valid policy should be deemed to have been executed in the defendants' ordinary form, in accordance with the covering note. The Court ordered the case to be struck out, on the ground that they could not hear it without sanctioning what amounted to an evasion of the stamp laws.

NIXON AND OTHERS *v.* THE ALBION MARINE INSURANCE COMPANY 338

5. ———, when leave to appear under Bills of Exchange Act will be rescinded 56
See BILL OF EXCHANGE.

6. ———, time for pleading release in deed under Bankruptcy Act, 1861 183
See BANKRUPTCY ACT, 1861. 7.

7. ———, where deed under Bankruptcy Act, 1861, containing release not pleaded 208
See BANKRUPTCY ACT, 1861. 9.

8. ———, action for money had and received where money paid in consequence of misrepresentation of agent 259
See PRINCIPAL AND AGENT. 2.

9. ———, fraud of agent in the course of his employment may be charged in pleading as fraud of principal 259
See PRINCIPAL AND AGENT. 2.

10. ———, as to entering verdict on leave reserved 316
See HIGHWAY.

11. ———, right to begin upon cross demurrers 400
See MARINE INSURANCE. 2.

12. ———. *See* PLEADING.

PRINCIPAL AND AGENT—*Foreign Market—Exigencies of Market—Order to purchase, Substantial Compliance with—Money paid.*] The defendant, who resided at Liverpool, gave to the plaintiff, who carried on business at Pernambuco, an order to purchase 100 bales of cotton of a specified quality, in the following terms: "I beg to confirm my letter of the 23rd of February, and hope you will have executed fully all the cotton ordered, and consider still in force. If executed, please regard this as a new order for 100 more." The plaintiffs, acting on this order, purchased in the market, and paid for, ninety-four bales of the specified cotton. No direct evidence was given as to the then state of the Pernambuco market; but the circumstances of the case rendered it reasonable to infer that the plaintiffs, in purchasing ninety-four bales, had done all that was practicable. The defendant declined to pay for these bales on the ground that his order had been inade-

PAGE

quately performed:—*Held*, that the order must be construed with reference to the state of market for which it had been given, and that it had been substantially complied with.
JOHNSTON AND OTHERS *v.* KERSHAW 82

2. PRINCIPAL AND AGENT—*Misrepresentation—Money had and received.*] A principal is liable to an action for the fraudulent misrepresentation of his agent, acting in the course of his business. The plaintiff having for some time, on a guarantee of the defendants, supplied J. D., a customer of theirs, with oats on credit, for carrying out a government contract, refused to continue to do so unless he had a better guarantee. The defendants' manager thereupon gave him a written guarantee to the effect that the customer's cheque on the bank in plaintiff's favour, in payment for the oats supplied, should be paid, on receipt of the government money, in priority to any other payment, "except to this bank." J. D. was then indebted to the bank to the amount of 12,000*l.*, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff thereupon supplied the oats to the value of 1227*l.*; the government money, amounting to 2676*l.*, was received by J. D., and paid into the bank; but J. D.'s cheque for the price of oats drawn on the bank in favour of the plaintiff was dishonoured by the defendants, who claimed to retain the whole sum of 2676*l.* in payment of J. D.'s debt to them. The plaintiff having brought an action for false representation, and for money had and received:—*Held*, first, that there was evidence to go to the jury that the manager knew and intended that the guarantee should be unavailing, and fraudulently concealed from the plaintiff the fact which would make it so. Secondly, that the defendants would be liable for such fraud in their agent. Thirdly, that the fraud was properly charged in the declaration as the fraud of the defendants.
Quære, whether the plaintiff could have recovered under the count for money had and received.
BARWICK *v.* ENGLISH JOINT STOCK BANK .. Ex. Ch. 259

3. ————————, authority of general manager of railway company to bind company 228
See RAILWAY COMPANY. 3.

PRIVILEGE of royal residences 290
See ROYAL RESIDENCE.

PROCESS, whether available against a judgment debtor who has executed a deed under the Bankruptcy Act, 1861, containing a release which might have been, but was not, pleaded to the action 208
See BANKRUPTCY ACT, 1861. 9.

————, execution of, in royal residences 290
See ROYAL RESIDENCE.

PROTECTION from arrest under Bankruptcy Act, 1861 115
See BANKRUPTCY ACT, 1861. 6.

PUBLIC, evidence of user of public way by 316
See HIGHWAY.

PURCHASE, effect of order to effect, at a foreign market 82
See PRINCIPAL AND AGENT. 1.

PURCHASER: *See* VENDOR AND PURCHASER; CONTRACT OF SALE.

RAILWAY AND CANAL TRAFFIC ACT, s. 7, what amounts to an unreasonable condition under 173
See RAILWAY COMPANY. 1.

RAILWAY COMPANY—*Liability as Carriers—Negligence—Railway and Canal Traffic Act* (17 & 18 *Vict. c.* 31) *s.* 7—*Just and reasonable Conditions—Alternative to Customer—Complete Delivery.*] A con-

PAGE

tract for the conveyance of cattle by railway, signed by the party sending them, containing the two following, amongst other, conditions :—"The owner undertakes all risks of loading, unloading, and carriage, whether arising from the negligence or default of the company or their servants, or from defect or imperfection in the station, platform, or other places of loading or unloading, or of the carriage in which the cattle may be loaded or conveyed, or from any other cause whatsoever." "The company will grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons with and to take care of them":—*Held*, that the first of these conditions was unreasonable, and that its unreasonable character was not removed by the fact that the company, under the second condition, granted and the owner accepted, a free pass for a person who travelled with the cattle sent.

ROOTH *v.* THE NORTH EASTERN RAILWAY COMPANY 173

2. RAILWAY COMPANY—*Assignment of Rolling Stock—Illegality—Lloyd's Bond.*] A railway company gave a Lloyd's bond to their contractor, who handed it to the plaintiff to secure an advance of 10,000*l.* then made to him by the plaintiff. The plaintiff having, in the name of the obligee, brought an action against the company upon the bond, it was compromised before judgment on the terms that the company should transfer to him the whole of their rolling stock as security. The rolling stock was transferred accordingly, but was subsequently seized by the defendant, an execution creditor of the company. On the trial of an interpleader issue between the plaintiff and defendant :—*Held*, first, that no evidence was admissible to impeach the original legality of the bond; and, secondly, that the conveyance of the rolling stock by the company to the plaintiff was valid as against the defendant.

BLACKMORE *v.* YATES 225

3. ——————, *General Manager—Authority to bind Company to pay for Surgical Attendance on Injured Person.*] The general manager of a railway company has, as incidental to his employment, authority to bind the company to pay for surgical attendance bestowed, at his request, on a servant of the company injured by an accident on their railway. *Cox* v. *Midland Counties Railway Company* (3 Ex. 268), considered.

WALKER *v.* THE GREAT WESTERN RAILWAY COMPANY 228

4. ——————, power of, to contract 356

See CORPORATION CREATED BY STATUTE.

REASONABLE CONDITION under Railway and Canal Traffic Act, what is 173

See RAILWAY COMPANY. 1.

REFERENCE, what amounts to, to arbitration within the C. L. Pro. Act, 1854, s. 13. 72

See VENDOR AND PURCHASER.

RELEASE, in deed under Bankruptcy Act, 1861 21

See BANKRUPTCY ACT, 1861. 1.

——————, in deed under Bankruptcy Act, 1861, time for pleading .. 183

See BANKRUPTCY ACT, 1861. 7.

——————, after action, in deed under Bankruptcy Act, 1861 275

See BANKRUPTCY ACT, 1861. 2.

REMOTENESS of damage 340

See CONTRACT. 3.

REPUDIATION, plea of, of shares on account of fraud 324

See COMPANY. 2.

PAGE

REPUTED OWNERSHIP, effect of custom upon provisions in Bankruptcy Acts relating to 101
See BANKRUPT LAW CONSOLIDATION ACT, 1849. 1.

RESCISSION of charterparty after portion of cargo burnt 335
See SHIP AND SHIPPING. 5.

RESIDENCE, ROYAL, privileges of 290
See ROYAL RESIDENCE.

REVENUE, stamp upon conveyance of retiring partner to continuing partners 46, 399
See STAMPS. 1, 2.

RIGHT OF ACTION, when once vested not affected by death 311
See CONTRACT. 2.

RIGHT TO BEGIN upon cross demurrers 400
See MARINE INSURANCE. 2.

RIPARIAN OWNERS, right of, to watercourse 1
See EASEMENT.

ROLLING STOCK, effect of assignment of whole of, by railway company 225
See RAILWAY COMPANY. 2.

ROYAL RESIDENCE—*Privilege—Sheriff — Process — Hampton Court Palace.*] Hampton Court Palace forms part of the royal demesnes of the Crown, and was formerly a royal residence, but has not been personally occupied by the sovereign since 10 Geo. 2. The state apartments are, and have been for many years past, used as a picture gallery; the pictures are the property of the Crown, but the public are admitted to view them gratuitously; the other apartments are occupied partly by officers of the palace, but principally by private persons, by the permission and at the pleasure of the Crown. The palace and grounds are maintained by the Crown, by its own officers and servants; a guard of honour is kept there, and service is performed in the Chapel Royal by a resident chaplain appointed by the Crown. The palace is under the control of a housekeeper appointed by the Crown, who has apartments in the palace. A writ of fi. fa. having been executed in one of the suites of apartments occupied by private persons, and an information of intrusion having been filed against the sheriffs and their officers:—*Held* per curiam, first, that the privilege of palace is attached to any place which is, in fact, the sovereign's residence; secondly, that actual personal residence at the time is not necessary to confer the privilege, if there be an intention to resume residence. But *held* per Martin and Bramwell, BB., that in this case, the palace being so occupied that the Crown could not immediately resume occupation, such occupation of it was inconsistent with its being a royal residence, and that judgment should be for the defendants. Per Kelly, C.B., that, considering that the palace was once a royal residence, its present use was not inconsistent with an intention in the Crown to resume residence, and that judgment should be for the Crown.
ATTORNEY-GENERAL *v.* DAKIN AND OTHERS 290

SALE, BILL OF, agreement to give 334
See BILL OF SALE.

SATISFACTION of bill of exchange, what amounts to a good plea of .. 56
See BILL OF EXCHANGE.

PAGE

CI. FA., practice as issuing writ of 284
See PRACTICE. 3.

SERVANT, injury to, by negligence of fellow servant 30
See MASTER AND SERVANT.

SHERIFF, duty of, in executing process in royal residences 290
See ROYAL RESIDENCE.

SHIP AND SHIPPING—*Bill of Lading, indorsement of—Discharge of Indorser from liability—Acquiescence and Waiver.*] The consignee of goods, before the arrival of the ship, indorsed over the bill of lading, but not so as to pass the property in the goods, to wharfingers in these words: "Deliver to W. & K. or order, looking to them for all freight, dead freight, and demurrage, without recourse to us." The plaintiffs, the shipowners, accepted the indorsement, and in pursuance of it delivered the goods to W. & K.:—*Held*, that the shipowners were not entitled to sue the consignee for freight.

LEWIS AND OTHERS *v.* M'KEE. 37

2. ———————, *Charterparty—Freight, Mode of calculating—Measurement at Port of shipment or discharge—Increase of Bulk—Custom—Evidence of Custom—Notice of Custom.*] By a charterparty made between the plaintiff, a shipowner, and the defendants, merchants at Manchester, it was agreed that the plaintiff's ship should sail to Bombay, and there load a cargo of cotton, and proceed with it to Liverpool, and "deliver the same" on being paid freight at the rate of "75*s.* per ton of 50 cubic feet delivered; the freight to be paid on right delivery of the cargo." The ship accordingly sailed to Bombay, and received a cargo of cotton which, previously to being loaded, had been subjected, in accordance with the usual practice, to a high hydraulic pressure, so as to reduce its solid contents to a minimum. On being removed from the hold at Liverpool the cotton naturally expanded very considerably, and the plaintiff claimed in this action freight on its measurement when delivered, and not when shipped. At the trial it was proved to be the custom of the Bombay trade to pay freight for cotton goods under a charterparty worded as above, on the measurement of the goods at the port of shipment. No evidence was given to shew that the plaintiff had actual notice of the custom:—*Held*, first, that, apart from the custom proved, the freight was payable, on a true construction of the charterparty itself, on the measurement of the goods when shipped, and not when delivered; and secondly, that the evidence of the custom was properly admitted as not being contradictory of the terms of the charterparty. Per Kelly, C.B., and Pigott, B., that the circumstances of the case were such as to raise a presumption that the plaintiff was aware of the custom. Per Channell, B., that the fact of the plaintiff not having been proved to have had notice of the custom was an objection rather to the weight than to the admissibility of the evidence. [*Affirmed in Ex. Ch. at p.* 333, *vide next case, inf.*]

BUCKLE *v.* KNOOP AND ANOTHER 125

3. ———————, *Charterparty—Construction* ("*delivered*")—*Freight, Mode of calculating—Measurement at port of Shipment or Discharge—Increase of Bulk.*] By a charterparty made between the plaintiff and the defendants, it was agreed that the plaintiff's ship should sail to Bombay and there load from the defendants a full cargo of cotton, and proceed with it to Liverpool and deliver the same on being paid freight at the rate of "75*s.* per ton of 50 cubic feet delivered." The ship received at Bombay, and carried to Liverpool, a full cargo of cotton; the cargo was packed at Bombay, as is customary, in compressed bales, and expanded greatly on being unloaded at Liverpool:—*Held* (affirming the judgment of the Court below), that the

PAGE

freight was payable on the measurement of the goods when shipped, and not when delivered.
BUCKLE *v.* KNOOP AND ANOTHER .. .. .. Ex. Ch. 333

4. SHIP AND SHIPPING—*Bill of Lading—Written and Printed Words—Construction—Bills of Lading Act* (18 & 19 *Vict. c.* 111), *s.* 3—*Ship's Agent or Consignee.*] The defendants were charterers of a steamship engaged in the Mediterranean trade, and had ship's agents or consignees at the ports of call. It is the custom for a ship's agent or consignee to sign bills of lading instead of the master, and no difference is recognised in trade usage between the efficacy of his signature and that of the master. The defendants' agents at Genoa signed a bill of lading for manganese, shipped in bulk and not weighed at the time of shipment, which described the manganese as of a certain weight, but contained in print the words, "weight, contents, and value unknown." The plaintiff was assignee for full value of this bill, and the whole of the manganese shipped was, on the arrival of the ship, delivered to him, but was found to be short of the weight stated in the bill. In an action brought by him to recover damages for non-delivery of the full weight:—*Held*, first, that the printed words controlled the statement of weight. Secondly, that the defendants were not bound by the signature of their agents to a bill of lading for a greater quantity than was actually shipped.
JESSEL *v.* BATH AND OTHERS 267

5. ———————————, *Charterparty—Rescission—Construction—"Full and complete Cargo"—Fire—Different Voyage.*] The defendant chartered a vessel to proceed to P., and there load "a full and complete cargo;" the charterparty contained the usual exception of "fire, &c." After part of the cargo was on board, and whilst a portion of the residue was lying alongside, the vessel caught fire; the fire was extinguished by scuttling the vessel, and the damaged cargo on board was necessarily sold by the master, who also forwarded by another vessel the portion then lying alongside. After the ship had been repaired, it was tendered to defendant's agents, but they refused to load any further cargo:—*Held*, that the defendant was not exonerated from his obligation to load a full and complete cargo.
JONES *v.* HOLM 335

6. ———————————, effect of change of voyage upon contracts of seamen 340
See CONTRACT. 3.

SLANDER, words spoken in respect of plaintiff's business 327
See DEFAMATION.

SLAUGHTER HOUSE, consent necessary for the using of a new, under the Towns Improvement Clauses Act, 1847 167
See CONSTRUCTION. 3.

SOLICITOR: *See* ATTORNEY.

SPECIAL CASE ordered to be struck out on the ground that the court could not hear it without sanctioning what amounted to an evasion of the stamp laws 338
See PRACTICE. 4.

SPECIAL DAMAGE, in action for obstructing highway, plaintiff must shew 316
See HIGHWAY.

——————— in action for slander 327
See DEFAMATION.

STAMP ACT (13 & 14 Vict. c. 97), construction of 46, 399
See STAMPS. 1, 2.

PAGE

STAMP ACTS: *See* STAMPS.

TAMPS, 13 & 14 *Vict. c.* 97, *Sch. Tit.* "*Conveyance*"—*Conveyance upon sale of Property—Dissolution of Partnership—Conveyance by retiring Partner to Co-partner.*] A dissolution of partnership being in contemplation between two persons, one of whom was desirous of retiring from business, a deed was entered into, whereby after reciting an agreement for dissolution and that the property of the firm and the share due to the retiring partner had been ascertained, that in respect of such share a specified sum had been paid in cash, and that the remainder was to be secured by a mortgage, and by assignment of certain policies of insurance, it was witnessed that the partnership was dissolved, and that the retiring partner should forthwith release to the remaining partner all his estate in the partnership property, real or personal, and obtain the concurrence in the conveyance of all necessary parties. By an indenture of later date, reciting the previous deed, the retiring partner, "in pursuance of the agreement and in consideration of the premises," conveyed to the remaining partner all his estate and interest in the partnership property and assets:—*Held*, that the indenture was liable to ad valorem stamp duty, as a "conveyance upon the sale of property," within the meaning of 13 & 14 Vict. c. 97, sch. tit. "Conveyance."

CHRISTIE *v.* THE COMMISSIONERS OF INLAND REVENUE 46

2. ———, 13 & 14 *Vict. c.* 97, *Sch. Tit. Conveyance—Partnership, dissolution of—Conveyance by retiring Partner.*] On a dissolution of partnership a deed was executed, by which, after reciting that it had been agreed that the share of the retiring partner (Sir G. R. P.) in the real assets of the firm should be taken by the continuing partners, and that he should be allowed in account the sum of 17,313*l.* as an equivalent for the value of his share; the retiring partner, in consideration of the sum of 17,313*l.*, "part of the moneys and assets of the said dissolved co-partnership to the said Sir G. R. P. so allowed in account, appropriated, and paid as aforesaid," conveyed his share of the real assets to the continuing partners:—*Held*, that the indenture was liable to ad valorem stamp duty, as a conveyance upon a sale within the meaning of 13 & 14 Vict. c. 97, sch. tit. "Conveyance."

PHILLIPS AND OTHERS *v.* THE COMMISSIONERS OF INLAND REVENUE 399

3. ———, special case ordered to be struck out on the ground that the court could not hear it without sanctioning what amounted to an evasion of the stamp laws 338
See PRACTICE. 4.

STATUTE, rights and liabilities of corporations created by 356
See CORPORATION CREATED BY STATUTE.

STATUTE OF FRAUDS: *See* FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS: *See* LIMITATIONS, STATUTE OF.

STATUTES:

21 Jac. 1, c. 16, s. 3 153
See LIMITATIONS, STATUTE OF.

29 Car. 2, c. 3, s. 17 135
See FRAUDS, STATUTE OF.

38 Geo. 3, c. 5, s. 25 253
See LAND TAX.

38 Geo. 3, c. 60, s. 1 253
See LAND TAX.

PAGE

STATUTES (*continued*):

59 Geo. 3, c. 69, ss. 2, 7 340
See CONTRACT. 3.

1 & 2 Vict. c. 110, s. 14 131
See DEBTOR AND CREDITOR.

3 & 4 Vict. c. 82, s. 1 131
See DEBTOR AND CREDITOR.

8 & 9 Vict. c. 16 158
See COMPANY. 1.

10 & 11 Vict. c. 34, s. 108 88
See CONSTRUCTION. 2.

——————— s. 126 167
See CONSTRUCTION. 3.

12 & 13 Vict. c. 106, s. 67 304
See BILL OF SALE.

———————, s. 125 101
See BANKRUPT LAW CONSOLIDATION ACT, 1849. 1.

13 & 14 Vict. c. 97 .. .. 46, 399
See STAMPS. 1, 2.

15 & 16 Vict. c. 76, s. 27 15
See ACTION. 1.

15 & 16 Vict. c. 76, s. 222 54
See PRACTICE. 2.

17 & 18 Vict. c. 31, s. 7 173
See RAILWAY COMPANY. 1.

———————, c. 125, ss. 11, 13 72
See VENDOR AND PURCHASER.

18 & 19 Vict. c. 67 56
See BILL OF EXCHANGE.

———————, c. 111, s. 3 267
See SHIP AND SHIPPING. 4.

24 & 25 Vict. c. 134, s. 192 .. 21, 42, 183, 189, 208, 249, 275, 394, 396
See BANKRUPTCY ACT, 1861. 1, 2, 4, 7, 8, 9, 10, 12, 13.

———————, s. 198 .. .. 35, 115
See BANKRUPTCY ACT, 1867. 3, 6.

TENDER OF COMPOSITION under deed in Bankruptcy Act, 1861 .. 21
See BANKRUPTCY ACT, 1861. 1.

TOWNS IMPROVEMENT CLAUSES ACT, 1847, construction of .. 88, 167
See CONSTRUCTION. 2, 3.

TRADER DEBTOR SUMMONS, effect of taking out, for more than is due 248
See BANKRUPT LAW CONSOLIDATION ACT, 1849. 2.

TRUSTEE, discretion of, in deed under Bankruptcy Act, 1861 42
See BANKRUPTCY ACT, 1861. 4.

ULTRA VIRES, what contracts of railway company are 356
See CORPORATION CREATED BY STATUTE.

PAGE

UNDERTAKING of attorney for amount of debt or costs, effect of .. 249
See BANKRUPTCY ACT, 1861. 10.

UNLIQUIDATED DEMAND, deed under Bankruptcy Act, 1861, is no answer to 105
See BANKRUPTCY ACT, 1861. 5.

UNREASONABLENESS, what amounts to such, as to invalidate an alleged custom 96
See CUSTOM. 1.

UNREASONABLE PROVISION in deed under Bankruptcy Act, 1861, s. 192 .. .. 115, 394, 406
See BANKRUPTCY ACT, 1861. 6, 12, 14.

USER of highway by public, evidence of 316
See HIGHWAY.

VARIATION of written contract within Statute of Frauds 135
See FRAUDS, STATUTE OF.

VENDOR AND PURCHASER—*Conditions of Sale—Condition for Compensation for Mistake in Particulars—Mistake discovered after Conveyance—Arbitration—Common Law Procedure Act*, 1854 (17 & 18 *Vict.* c. 125), *ss.* 11, 13.] At a sale by auction of premises belonging to the defendants, stated in the particulars of sale as being then let at a rental of 30*l.* per annum, one of the conditions was that, if any mistake was made in the description of any of the properties offered for sale, or if any error whatever appeared in the particulars of sale, such mistake or error should not annul the sale, but a compensation in such case should be given, to be settled by two referees, one to be appointed by either party to the sale, or an umpire. The plaintiffs purchased of the defendants the premises subject to this condition. After the conveyance had been executed, an error in the rental stated in the particulars was discovered:—*Held*, that the error was a proper subject of compensation within the meaning of the condition, although not discovered until after the execution of the conveyance. The defendants having failed to appoint a referee for seven clear days after the plaintiffs had appointed one, and after a notice in writing requiring them to make the appointment, the plaintiffs, acting under the provisions of the Common Law Procedure Act, 1854, s. 13, appointed their referee to act as sole arbitrator, and a sum of money was awarded by him to them by way of compensation for the error:—*Held*, following *Collins* v. *Collins* (26 Beav. 306; 28 L. J. (Ch.) 184, that the reference indicated in the condition being one of the quantum of compensation only, was not a reference to arbitration of an existing or future difference within the meaning of the Common Law Procedure Act, 1854, s. 11; and that the plaintiffs had, therefore, no power, under s. 13 of that act, to appoint their referee as sole arbitrator.
BOS AND ANOTHER *v.* HELSHAM AND ANOTHER 72

VERDICT, practice as to entering upon leave reserved 316
See HIGHWAY.

WAIVER of forfeiture 92
See LANDLORD AND TENANT. 1.

WATER, rights of riparian owners to 1
See EASEMENT.

"WATER AND SOIL," meaning of words in a lease 285
See CONSTRUCTION. 6.

PAGE

WATERCOURSE, rights of riparian owners 1
See EASEMENT.

WAY, public, action for obstructing 316
See HIGHWAY.

"WEIGHT, contents, and value unknown," effect of words in a bill of lading 267
See SHIP AND SHIPPING. 4.

WORDS, "creditor" 396
See BANKRUPTCY ACT, 1861. 13.

———, "full and complete cargo" 335
See SHIP AND SHIPPING. 5.

———, "75*s.* per ton of 50 cubic feet delivered" 333
See SHIP AND SHIPPING. 3.

———, "water and soil" 285
See CONSTRUCTION. 6.

———, "weight, contents, and value unknown" 267
See SHIP AND SHIPPING. 4.

——— SPOKEN in respect of plaintiff's business 327
See DEFAMATION.

WRIT OF FI. FA., execution of, in royal residence 290
See ROYAL RESIDENCE.

WRIT OF SCI. FA., practice as to issuing 284
See PRACTICE. 3.

*** For REGULA GENERALIS as to proceedings on Appeals, *See* Law Rep. 2 Q.B. 655.

END OF VOL. II.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.

BIBL. LONDIN UNIV.

UL 12 AUG 1977